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## THE PAQUETE HABANA: A CASE HISTORY IN THE DEVELOPMENT OF INTERNATIONAL LAW

Scott W. Stucky†

*In The Paquete Habana, decided in 1900, the United States Supreme Court adopted the doctrine that coastal fishing vessels are exempt from capture as prize of war. The Court held that the exemption was an established custom of international law, which—in the absence of a controlling executive or judicial decision—should be incorporated into the corpus of our common law. The Paquete Habana influenced the development of positive rules of international law that expanded the class of civilian vessels that are exempt from capture. Recently, the lower federal courts have begun to utilize The Paquete Habana as precedent for the incorporation of international law other than that governing the conduct of naval warfare. In this article, the author analyzes the decision and its historical antecedents and examines the applicability of The Paquete Habana principle to twentieth century naval conflicts involving the United States. The author contends that the overriding importance of The Paquete Habana is its role as a monument to the continuing vitality of international law.*

### I. INTRODUCTION

*The Paquete Habana* and *The Lola*,<sup>1</sup> often-cited prize cases decided by the United States Supreme Court in 1900, share a fate akin to that of Southey's *Battle of Blenheim*,<sup>2</sup> being more praised than analyzed. The cases arose at the outbreak of the Spanish-American War when two Cuban fishing vessels, the *Paquete Habana* and the *Lola*, were captured by a United States naval blockade squadron. Both vessels were removed from Cuban waters and sold by the United States as prizes of war. Appeals challenging these sales subsequently were filed in the Supreme Court, and the cases were consolidated for argument and decision. Although *The Paquete Habana* is a staple of introductory casebooks in international

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1. 175 U.S. 677 (1900). Unless otherwise noted, the name *The Paquete Habana* will refer to both cases.

2. "And everybody praised the Duke/Who this great fight did win./'But what good came of it at last?' Quoth little Peterkin./'Why, that I cannot tell,' said he;/'But 'twas a famous victory.'" R. SOUTHEY, *THE BATTLE OF BLenheim* (1798).

law,<sup>3</sup> it has received little thorough analysis. This article subjects the case to a deeper probing and explores the origins of the case, the influences that produced the opinion, and the effect of the opinion on twentieth century international law.

Because *The Paquete Habana* was a Spanish-American War prize case, Section II of this article traces the development of United States prize law prior to 1898 and the nineteenth century efforts to establish an internationally accepted law of prize. Section III discusses the background of the Spanish-American War relevant to *The Paquete Habana* decision, particularly the blockade of Cuba. Section IV reviews the course of *The Paquete Habana* from the captures through the final Supreme Court decision and the predilection of Justice Horace Gray, author of the initial Supreme Court opinion, to analyze issues in light of historical developments. *The Paquete Habana* opinion is analyzed in Section V, with emphasis on its effect on the legal community. Section VI discusses the impact of the case on international law, especially its effect on the Second Hague Conference of 1907, which enacted into positive international law the prize law principle that coastal fishing vessels are immune from capture. Sections VII and VIII examine the principle as applied in this century's two world wars. Section IX identifies the relevance of the principle to, and examines its use in, the limited war situations that have occurred since 1945. Finally, Section X examines the impact of *The Paquete Habana* on the current attitude of the United States toward international law in areas other than prize law.

## II. UNITED STATES PRIZE LAW PRIOR TO 1898

The American law of maritime prize is older than the nation itself. In fact, maritime prize law gave rise to the first distinctively federal court under the Confederation — the Court of Appeals in Cases of Prize and Capture.<sup>4</sup> The genesis of American maritime prize law, however, resulted from the work of John Marshall and his brethren on the Supreme Court during the War of 1812. The origin of the war with regard to neutral rights and naval impressment, together with the imposition of a general embargo shortly before war was declared, produced an extraordinary number of prize cases for the Court.<sup>5</sup>

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3. W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 26 (3d ed. 1971); C. FENWICK, CASES ON INTERNATIONAL LAW 17 (2d ed. 1951); M. McDUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 77 (1981); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT 531 (1976); B. WESTON, R. FALK, & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED CASEBOOK 174 (1980).

4. See generally H. BOURGUIGNON, THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION (1977); J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801 in 1 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 147-95 (1971).

5. G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-

The most famous of these was *The Schooner Exchange v. McFaddon*,<sup>6</sup> which has been called "one of the great fundamental decisions in international law."<sup>7</sup> In establishing that an armed foreign public vessel, formerly taken as prize by the French, was immune from subsequent American admiralty jurisdiction, Justice Marshall promulgated a principle that has endured in American law.<sup>8</sup> After canvassing the state of international practice, Justice Marshall emphasized the limiting effect of international law and custom on domestic jurisdiction. In Justice Marshall's view, the values inherent in "distinct sovereignties . . . whose mutual benefit is promoted by intercourse with each other and by an interchange of those good offices which humanity dictates"<sup>9</sup> necessitated a reciprocal relaxation of otherwise complete municipal authority.

*The Schooner Exchange* was not the only prize case arising during the war. The Court also decided cases on such recurring issues of prize law as the "days of grace" allowed to expatriate goods from Britain,<sup>10</sup> the problems associated with American or neutral individuals or firms having enemy commercial domiciles,<sup>11</sup> the rights of individuals shipping neutral goods on British ships,<sup>12</sup> and the use of neutral flags as a cover to ship enemy goods.<sup>13</sup>

In view of this outpouring of prize cases, it is not surprising that, at the end of the war, Henry Wheaton, later the Supreme Court's reporter,

1815 in 2 THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 438-39 (1971).

6. 11 U.S. (7 Cranch) 116 (1812).

7. 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 425-26 (1937). The fact that the principle prize reports available at that time were Sir William Scott's from the first Napoleonic War, see 1-6 C. Rob. Adm. (1798-1808); E. ROSCOE, LORD STOWELL, HIS LIFE AND THE DEVELOPMENT OF ENGLISH PRIZE LAW (1916) (passim), together with Justice Story's opinion that English precedent should control, G. HASKINS & H. JOHNSON, *supra* note 5, at 442; see *The Nereide*, 13 U.S. (9 Cranch) 388, 436-56 (1815); *The Venus*, 12 U.S. (8 Cranch) 253, 287-88, 299 (1814), caused a certain lack of solicitude for neutral rights in some cases. Chief Justice Marshall strongly fought this tendency, making the case for an American prize law better suited to a state that was not a great naval power and that, as a matter of policy, attempted to avoid involvement in European wars. See *The Venus*, 12 U.S. (8 Cranch) 253 (1814) (Marshall, C. J.); G. HASKINS & H. JOHNSON, *supra* note 5, at 441-42, 449. He prevailed, and a pragmatic attitude toward English precedent came to be accepted, one that fit the nation's nineteenth and twentieth-century policy emphasis on neutral rights. G. HASKINS & H. JOHNSON, *supra* note 5, at 449.

8. See, e.g., *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562, 574 (1926) (extending the principle elucidated in *The Schooner Exchange* to merchant ships of foreign governments); see also *Ex parte Peru*, 318 U.S. 578, 587-88 (1943) (citing *The Schooner Exchange* for the proposition that executive branch action preempts jurisdiction of the district court on the issue of immunity).

9. 11 U.S. (7 Cranch) 116, 136-37 (1812).

10. *The Thomas Gibbons*, 12 U.S. (8 Cranch) 421 (1814).

11. *The Venus*, 12 U.S. (8 Cranch) 253 (1814).

12. *The Nereide*, 13 U.S. (9 Cranch) 388 (1815); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191 (1815).

13. *Cargo of the Ship Hazard v. Campbell*, 13 U.S. (9 Cranch) 205 (1815).

authored the first American treatise on prize law, *A Digest of the Law of Maritime Capture and Prize*.<sup>14</sup> This book contains a significant number of American cases that demonstrate the Court's divergence from English law.<sup>15</sup> The book is also a useful aid in analyzing *The Paquete Habana* because it contains perhaps the first American statement on the central question in *The Paquete Habana*: Are fishing vessels immune from capture? Wheaton wrote:

[I]t has been usual in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it.<sup>16</sup>

Wheaton was mistaken in stating that the custom had disappeared; although, as noted in *The Paquete Habana* opinion, the status of the custom had been uncertain during the early Napoleonic Wars.<sup>17</sup> The famous English writer, Joseph Chitty (upon whom Wheaton clearly relied), gave a brief but accurate account of the early nineteenth century English view in his *Treatise on the Law of Nations*:<sup>18</sup> "In some wars, it has been usual to make an exception in favour of small fishing-vessels, from tenderness to a poor and industrious order of people. This, however, as appears from the case of *The Young Jacob and Johanna*, is a matter of forbearance, and not of right."<sup>19</sup>

The case of *The Young Jacob and Johanna*<sup>20</sup> was the leading English authority on the issue of the fishing boat exemption. In that case, a small Dutch fishing boat was taken by a British ship while returning from the Dogger Bank to Holland. Although Sir William Scott recognized that it had been the general custom in former wars not to make prizes of such vessels, he stated that this was a rule of comity only, not of international law. Thus, under general principles of prize law, the vessel could be condemned as one engaged in enemy trade. To the argument that such boats bore no national character, but frequently came to England to sell their fish, Scott replied that the argument need not be addressed because the indicia in this case pointed to Dutch trade. Moreover, Scott stated that

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14. H. WHEATON, *A DIGEST OF THE LAW OF MARITIME CAPTURE AND PRIZE* (1815).

15. *Id.*; G. HASKINS & H. JOHNSON, *supra* note 5, at 452.

16. H. WHEATON, *supra* note 14, at 60-61.

17. *The Paquete Habana*, 175 U.S. 677, 691-93 (1900).

18. J. CHITTY, *A PRACTICAL TREATISE ON THE LAW OF NATIONS, RELATIVE TO THE LEGAL EFFECT OF WAR ON THE COMMERCE OF BELLIGERENTS AND NEUTRALS; AND ON ORDERS IN COUNCIL AND LICENSES* (1812).

19. *Id.* at 87.

20. 1 C. Rob. Adm. 20 (1798).

there was a strong indication of fraud in this case.<sup>21</sup>

*The Young Jacob and Johanna* thus indicates a rather mixed attitude toward the fishing boat exemption. The existence of a general practice based on comity was accepted; however, the conditional and nonbinding nature of the exemption was emphasized. The holding was further complicated by Scott's statement that fraud was strongly indicated. Tacit recognition of the exemption combined with the belief that it was only a matter of comity, rather than a rule of international law, would mark the English attitude on the question of fishing vessel immunity for another century.

With the end of the War of 1812, American prize courts ceased activity. The next major developments in the American law of prize came with the Civil War. The nature of the Civil War at sea — an internecine conflict between an established government attempting to blockade an enormous length of coastline, and an insurgent regime seeking supplies, trade, and recognition abroad — naturally gave rise to a different mix of questions than had the War of 1812. Particularly important were questions regarding the status of the conflict as a "war" under international law, the rights of neutrals colorably attempting to trade with the Confederacy, and the character of property owned by domiciliaries of the Confederacy (i.e., whether such property was contraband).

Fundamental questions regarding the status of the conflict and the legality of prize action taken in reliance thereon were answered in the celebrated *Prize Cases*.<sup>22</sup> The Supreme Court held that the President did not need congressional approval to institute a blockade of the states then in rebellion and that the property of those residing or domiciled therein, although belonging to American citizens, was a proper subject of capture and condemnation in prize.<sup>23</sup> The Court found that the conflict was a "war" for purposes of international law and that the existence of a state of war permitted the Union to avail itself of belligerent rights. No declaration of war was necessary; the President's assessment of the situation and his action thereon was sufficient.<sup>24</sup> This decision announced principles of executive power that are important even today, and is notable for its treatment of international law as a dynamic, flexible instrument concerned with the reality of affairs and not trammelled by categories of municipal legislation.

The contraband question was treated in *The Peterhoff*<sup>25</sup> in a manner that survived until World War I. Essentially, items classified as contraband (most notably munitions and arms, but other things as well) could be seized and condemned from neutral vessels if it were shown that the items were intended for belligerent use; an overt attempt to run the

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21. *Id.* at 20-21.

22. 67 U.S. (2 Black) 635 (1863).

23. *Id.* at 665-74.

24. *Id.* at 669-71.

25. 72 U.S. (5 Wall.) 28 (1867).

blockade was not necessary. Noncontraband, however, could be seized only if a breach of the blockade was intended.<sup>26</sup> In a tangential line of prize cases,<sup>27</sup> the Supreme Court applied the doctrine of "continuous voyage" to condemn both cargoes and ships. "Continuous voyage," an English doctrine, meant that a neutral ship carrying contraband was good prize if captured on the high seas during a voyage between two neutral ports, provided the voyage would ultimately end with delivery of the contraband to a belligerent. In *The Bermuda*,<sup>28</sup> the leading continuous voyage case, the Court relied substantially on English law to buttress its departure from the traditional American solicitude for neutral rights.<sup>29</sup> Interestingly, the Union's naval position in relation to the Confederate property was analogous to the British position with regard to American property during the War of 1812, when American policy had opposed "continuous voyage" and other manifestations of British power.<sup>30</sup>

The vexing question regarding the status of the property of Confederate domiciliaries as prize, answered generally in the *Prize Cases*,<sup>31</sup> was given a closer analysis in *The Grey Jacket*.<sup>32</sup> In that case, the issue was whether the property of a Confederate domiciliary who claimed to have remained loyal to the Union could be condemned as prize. The Court, in a rather stringent opinion, held that domicile was dispositive of the enemy character of the property. A lone exception was provided for loyal persons who, upon the outbreak of hostilities, had escaped with what possessions they could transport. This principle, which also was applied to Army seizures of property on land,<sup>33</sup> would play a significant role in the government's case in *The Paquete Habana*.

Thus, by 1865 a significant body of American prize law had developed as the result of two separate conflicts that presented disparate challenges to American naval policy. Much of the law, particularly that produced by the War of 1812, was built upon British principles of comity. In later prize cases arising out of the Civil War,<sup>34</sup> however, American jurists took a rather pragmatic and even teleological view of international law as a body of jurisprudence capable of growth through changes in accepted international custom.

With regard to the development of international law, another case,

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26. *Id.* at 55-62.

27. *The Springbok*, 72 U.S. (5 Wall.) 1 (1867); *The Bermuda*, 70 U.S. (3 Wall.) 514 (1866); *The Hart*, 70 U.S. (3 Wall.) 559 (1866).

28. 70 U.S. (3 Wall.) 514 (1866).

29. *Id.* at 554-58.

30. A residual concern for neutral rights can be seen in *The Springbok*, 72 U.S. (5 Wall.) 1 (1867), where the Court, upholding the condemnation of the cargo, reversed condemnation of the vessel on the ground that the master believed in good faith that he was making a legitimate voyage from London to Nassau.

31. 67 U.S. (2 Black) 635 (1863).

32. 72 U.S. (5 Wall.) 342 (1867).

33. *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404 (1865).

34. See *supra* notes 22-24 and accompanying text.

*The Scotia*,<sup>35</sup> must be briefly mentioned. This was not a prize case, but one in admiralty, arising from a collision between American and British ships. The question was whether certain nautical "rules of the road," adopted in Britain by Orders in Council in 1863 and in the United States by an Act of Congress in 1864,<sup>36</sup> were applicable to an international collision on the high seas. In finding the rules applicable, the Court refused to limit the municipal laws to each nation's vessels, and held that the "common consent of civilized communities" — the adoption of the same rules by thirty nations within a few years of Britain's action — had made the rules part of customary international law. As such, the rules were obligatory on nations and their vessels.<sup>37</sup> This recognition of accepted international custom as making new, binding international law without any formal international agreement was clearly a doctrine with a potential for significant development, and one that would be of great importance to *The Paquete Habana*.

Although the United States was not directly involved, multilateral developments in the law of naval warfare occurred during the nineteenth century. The developments were indicative of a growing feeling among nations and among jurists that amelioration of the conditions of warfare was possible. This gradual development of law is one of the touchstones of *The Paquete Habana*.

The most notable multilateral treaty dealing with naval warfare in the nineteenth century was the Declaration of Paris in 1856, which abolished privateering and enunciated certain principles that reduced the permissible limits of capture.<sup>38</sup> The United States did not adhere to the Declaration. In fact, during the Civil War,<sup>39</sup> the Confederacy actually issued letters of marque and reprisal and engaged in privateering.<sup>40</sup> A notable effort to produce a codification of prize law, which included the introduction of an international prize court, was made by the Institute of International Law in the 1880's. In three sessions, at Turin in 1882, Munich in 1883, and Heidelberg in 1887, the Institute produced a lengthy model prize code. Article 110 of the code prohibited the seizure as prize of a broad variety of vessels, including fishing vessels, and privately owned cargo, unless a prize court determined that a particular vessel had violated the code.<sup>41</sup> Acts that constituted violations of the code were set out in Article 112 and included breach of blockade, resistance to stop-

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35. 81 U.S. (14 Wall.) 170 (1872).

36. Act of Apr. 29, 1864, ch. 69, 13 Stat. 58 (amended by Act of Feb. 28, 1871, ch. 100, § 47, 16 Stat. 453).

37. *The Scotia*, 81 U.S. (14 Wall.) 170, 187-88 (1872).

38. F. PIGGOTT, *THE DECLARATION OF PARIS 1856*, at 179-80 (1919).

39. *Id.* at 142.

40. See W. ROBINSON, *THE CONFEDERATE PRIVATEERS* (1928). The threat of Confederate privateering provoked a belated but abortive American offer to adhere to the Declaration. See also A. NEVINS, *THE IMPROVISED WAR 1861-1862* in 5 *THE ORDEAL OF THE UNION* 208 (1959); F. PIGGOTT, *supra* note 38, at 154-61.

41. J. SCOTT, *RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS* 75-76 (1916).



ping or search, and participation in hostilities.<sup>42</sup> Although these regulations, if adopted, would have drastically cut back the ambit of prize law, the proposed substantive limits on capture apparently provoked little dissent. Instead, disagreement over the jurisdiction and composition of the proposed international court precluded adoption of this code.<sup>43</sup>

The effort to codify international prize law was part of a larger movement, which included the Declaration of Paris. The movement was undertaken to purge the practice of warfare of methods that were deemed to be barbaric relics, among which was the opportunity for turning a private profit out of the public act of naval warfare. By 1895, an English international lawyer, although noting that the exemption of fishing boats from capture was a somewhat debatable point as a matter of law, opined that no civilized belligerent would now capture the boats of fishermen plying their avocation peaceably in the territorial waters of their own state.<sup>44</sup> This proposition was shortly put to the test when two "civilized belligerents," the United States and Spain, went to war.

### III. THE SPANISH-AMERICAN WAR

Examination of American political and naval policy and strategy is essential to an understanding of the facts in *The Paquete Habana*. After the sinking of the battleship U.S.S. Maine in Havana harbor on February 15, 1898, American public opinion, already inflamed by overheated press coverage of Cuban events, turned strongly toward a stern policy, including war if necessary, with Spain. Spain had made substantial concessions and, being wretchedly unprepared, was anxious to avoid war.<sup>45</sup> John Davis Long, President McKinley's Navy Secretary, wrote in his diary on April 5, 1898, "the country is so clamorous for action that the President cannot delay longer,"<sup>46</sup> and the day after he stated, "[t]he members of the House and Senate . . . are violently pressed by their constituents for some positive action."<sup>47</sup>

President McKinley's message to Congress of April 11, 1898, barely mentioned Spanish efforts at compromise and essentially gave Congress carte blanche to deal with the affair.<sup>48</sup> Congress responded on April 20, 1898, with a joint resolution so truculent and bellicose that Spain had no choice but to declare war. The joint resolution demanded that Spain at

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42. *Id.* at 76.

43. REGLEMENT INTERNATIONAL DES PRISES MARITIMES: PROJET ADOPTE PAR L'INSTITUTE DE DROIT INTERNATIONAL 7-11 (1888).

44. T. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 383 (1895); *see also* W. HALL, INTERNATIONAL LAW 381-83 (1880).

45. 1 F. CHADWICK, THE RELATIONS OF THE UNITED STATES AND SPAIN: THE SPANISH-AMERICAN WAR 33-46, 51-54, 94-126 (1911); D. TRASK, THE WAR WITH SPAIN IN 1898 11-29 (1981).

46. J. LONG, AMERICA OF YESTERDAY 176 (1923).

47. *Id.* at 177.

48. S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 118 (rev. ed. 1972).

once relinquish its authority and withdraw from Cuba and its waters and authorized the President to use the military forces of the United States to carry out the Congressional mandate.<sup>49</sup> Spain promptly severed diplomatic relations with the United States, and on April 22, 1898, President McKinley proclaimed a blockade of Cuban ports. Secretary Long, who had no illusions as to what this portended, recorded on April 21, 1898: "One of the busiest days of the season. Appoint Captain Sampson as Acting Admiral. Telegraph him to move at once to blockade Cuba, which, of course, is the beginning of war."<sup>50</sup>

American naval strategy in the event of a war with Spain had been under consideration for some months. A vital element in that strategy was a close naval blockade of Cuba, or as much of its coastline as American naval forces could patrol. Strategists believed the blockade would starve the Spanish army quartered in Cuba into submission without a fight, because the Cuban insurrection that precipitated the conflict had reduced available food supplies. The fear that American land forces would be decimated by tropical disease also encouraged implementation of this tactic. Furthermore, the blockade was expected to destroy Spanish West Indian commerce and was intended to place a significant logistical burden on Spain by forcing her to succor Cuba from a distance of 3,000 miles.<sup>51</sup>

The blockade strategy also evidenced a respect for the Spanish armed forces that was not always borne out by the performance of Spanish troops in combat. Captain (later Rear Admiral) William T. Sampson, who was to command the blockading squadron, favored an immediate naval attack on Havana. The Navy Department overruled this, fearing that too many American ships would be damaged and rendered unavailable for battle with the Spanish Navy. The blockade was viewed as a safer alternative that would reduce Spanish land forces without risking American ships against the shore batteries of Havana.<sup>52</sup>

The original blockade instructions from Secretary Long to Admiral Sampson, dated April 6, 1898, provided for a blockade of most of the Cuban coast:

The Department further desires that, in case of war, you will maintain a strict blockade of Cuba, particularly at the ports of Havana, Matanzas, and, if possible, of Santiago de Cuba, Manzanillo, and Cienfuegos. Such a blockade may cause the Spaniards to yield before the rainy season is over . . . . All prizes should be sent to Key West or other available U.S. ports for adjudication.<sup>53</sup>

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49. S. Con. Res. 24, 30 Stat. 738-39 (1898).

50. J. LONG, *THE JOURNAL OF JOHN DAVIS LONG* 223 (1956).

51. J. LONG, *THE NEW AMERICAN NAVY* 228-29 (1979).

52. *Id.* at 231.

53. *Annual Report of the Navy Department for the Year 1898: Appendix to the Report of*

This was an ambitious plan. During the next two weeks, however, as war approached, it became increasingly apparent that the naval force at Rear Admiral Sampson's disposal would be insufficient for such a task, especially because a portion of the American fleet had to be kept in readiness to deal with a Spanish squadron then in the Cape Verde Islands. Obviously, these vessels could not be tied down with blockade duty.<sup>54</sup> Thus, when the order to impose the blockade came, it was significantly more limited:

The Department's instructions of April 6 are modified as follows: You will immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west; also, if in your opinion your force warrants, the port of Cienfuegos on the south side of the island.<sup>55</sup>

President McKinley's proclamation of blockade was issued on April 22, 1898. After reciting its terms, the demands of the United States, and the authority of Congress's joint resolution, the proclamation stated that a blockade of the north coast of Cuba, including ports on the coast between Cardenas and Bahia Honda, and of Cienfuegos on the south coast, would be maintained "in pursuance of the laws of the United States and the laws of nations applicable to such cases."<sup>56</sup> Neutral vessels approaching these ports or attempting to leave them in ignorance of the blockade would be stopped and warned, and indorsements made of the warnings on their logs. Such vessels twice attempting to enter would be captured and sent in for adjudication as prize. Thirty days' grace was given neutral vessels to leave Cuban ports.<sup>57</sup> The proclamation was a formal notice to neutral nations of the blockade, as was required then by international law; however, it contained no mention of Spanish vessels.

War was formally declared by an Act of Congress on April 25, 1898, retroactive to April 21, 1898.<sup>58</sup> On the following day, President McKinley issued a proclamation declaring the rules under which the United States proposed to conduct the naval war.<sup>59</sup> This document eschewed any resort to privateering, stating that the United States would adhere to the Declaration of Paris.<sup>60</sup> It further proclaimed, in accord with the Declaration of Paris, that enemy goods under neutral flags, except for contraband, would be protected; that neutral goods, not contraband,

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*the Chief of the Bureau of Navigation* 171 (1898) [hereinafter cited as *Navy Report Appendix*].

54. J. LONG, *supra* note 50, at 232-34, 237.

55. Letter from Secretary Long to Rear Admiral Sampson, (Apr. 21, 1898), in *Navy Report Appendix*, *supra* note 53, at 175.

56. Proclamation of Apr. 22, 1898, in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1898, at 769 (1901) [hereinafter cited as FOREIGN RELATIONS].

57. *Id.* at 769-70.

58. Act of Apr. 25, 1898, ch. 189, 30 Stat. 364 (1898).

59. Proclamation of Apr. 26, 1898, in FOREIGN RELATIONS, *supra* note 56, at 772-73.

60. *Id.* at 772.

under the Spanish flag would not be confiscated; and that the blockade, in order to be binding on vessels attempting to enter or leave Cuba, must be maintained by a sufficient number of ships.<sup>61</sup> Spanish ships in American ports were given thirty days' grace to leave. Spanish ships bound for the United States prior to April 21, 1898, would not be molested. The right of search was "to be exercised with strict regard for the rights of neutrals,"<sup>62</sup> and mail steamers were not to be interfered with "except on the clearest grounds of suspicion."<sup>63</sup> The proclamation, in a phrase which also became a part of *The Paquete Habana* litigation, stated that the war "should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."<sup>64</sup> The proclamation, however, provided no exceptions from capture for any class of Spanish ships, other than the thirty days of grace.

President McKinley's proclamation represented an amelioration of the stringent interdiction of trade that marked American prize cases in the Civil War, particularly the substantial restraints on neutral rights practiced during that war to restrain trade with the Confederacy.<sup>65</sup> The 1898 proclamation was in some sense a return to earlier American solicitude for neutral rights. International law, as developed in the later nineteenth century, exerted only a marginal influence on the promulgation of President McKinley's proclamation. A far more significant influence was McKinley's desire to mollify the European nations, a number of whom looked askance at the American declaration of war.<sup>66</sup>

Spain, by Royal Decree of April 23, 1898, issued a proclamation analogous to President McKinley's. The Spanish proclamation differed from its American counterpart in three important respects: Spain reserved the right to commission privateers and issue letters of marque, although it stated that for the moment it would restrict itself to commissioning merchant vessels as auxiliary naval cruisers; the proclamation contained an open-ended list of contraband items; and the proclamation contained a provision evidently directed at potential American use of vessels manned by Cuban insurgents, which stated that captains and officers of non-American vessels, or of vessels manned by more than one-third non-Americans, who were captured while engaged in war against Spain, would be treated as pirates.<sup>67</sup>

On April 24, 1898, Spain issued detailed instructions to its navy re-

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* On the same day, Representative Gillett of Massachusetts introduced, with Administration support, a resolution that no privateers be commissioned by the United States, and that Spanish vessels be exempt from capture, except for those bearing contraband or breaching the blockade. *New York Commercial*, Apr. 26, 1898, at 1, col. 4.

65. *See The Bermuda*, 70 U.S. (3 Wall.) 514 (1866).

66. S. MORISON, *supra* note 48, at 119-20; J. LONG, *supra* note 51, at 233.

67. FOREIGN RELATIONS, *supra* note 56, at 774-75.

garding the exercise of the right to visit,<sup>68</sup> which contained substantial citations of the 1864 and 1868 Geneva Conventions relating to hospital ships and the treatment of wounded and sick combatants.<sup>69</sup> The United States, however, did not issue instructions to its blockading fleet until June 11, 1898.<sup>70</sup> The American instructions elaborated on the proclamation on April 26, 1898, without any significant departures from generally accepted principles of international law. In carrying out the policy of not offending neutral European nations, the instructions cautioned that "the crews of blockade runners are not enemies and should be treated not as prisoners of war, but with every consideration."<sup>71</sup> Other than the days of grace allowed in the April 26, 1898, proclamation, no exemptions from capture for Spanish vessels were provided, and the instructions did not mention immunity for fishing vessels. Detailed instructions were given on the bringing in of prizes for adjudication. The substantial amount of space devoted to prize adjudication in the American proclamation clearly demonstrated that the United States, although anxious not to offend European neutrals, nevertheless intended to carry on vigorous warfare against Spanish commerce.

Notwithstanding the insufficiency of American naval forces, a blockade was fixed around ports on the north coast of Cuba and was in place when war was declared. Within a day or two of the blockade's inception, a new problem presented itself to Rear Admiral Sampson and Secretary Long, one which seemingly had not been considered during the hasty and improvised blockade planning. This was the problem of whether Cuban fishing vessels, most of which were small coastal craft, should be seized. A number of these vessels had been taken in the first days of the war. On April 28, 1898, Rear Admiral Sampson wrote to Secretary Long concerning the problem:

I find that a large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging to the maritime inscription of Spain, who have already served in the Spanish navy, and who are liable to further service. As these trained men are naval reserve, have a semi-military character, and would be most valuable to the Spaniards as artillerymen, either afloat or ashore, I recommend

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68. The "right of visit" is the right of a warship to stop a suspicious vessel and send an officer aboard to ascertain the vessel's nationality. BLACK'S LAW DICTIONARY 1409 (5th ed. 1979).

69. FOREIGN RELATIONS, *supra* note 56, at 775-79.

70. *Id.* at 780.

71. *Id.* at 781. One instruction deserves mention in view of later American actions: it authorized the destruction of vessels taken as prize only if they could not be sent in, or appraised and sold on the spot. This was to be done only in the case of "controlling reasons," such as unseaworthiness or lack of a prize crew. In any such case, the papers were to be preserved and sent to the prize court for adjudication. *Id.* at 782.

that they should be detained prisoners of war, and that I should be authorized to deliver them to the commanding officer of the army at Key West.<sup>72</sup>

Secretary Long, who contemporaneously had received a letter from a Boston friend with information of a petition calling for immunity of all Spanish private property,<sup>73</sup> replied, "Spanish fishing vessels attempting to violate [the] blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained."<sup>74</sup>

This exchange, important to blockade policy and *The Paquete Habana* case, warrants analysis. Evidently, Rear Admiral Sampson believed there were some limits, however inchoate, on the capture of fishing vessels. The fishing vessels were under the Spanish flag and did not fall within the days of grace exemption in President McKinley's proclamation. Therefore, any exemption for them would have to be based on international custom, not on American instructions. Moreover, Sampson's request seems to have been tacitly limited to crewmen who might reasonably have been expected to take part in hostilities, although there was no indication that any of them had done so. An argument of military necessity would have been on stronger ground with such naval reservists rather than with the general run of fishermen; indeed, reservists might have been denominated combatants per se and, as such, not entitled to an exemption. Secretary Long's reply was broader than Rear Admiral Sampson's question; the reply covered all Spanish fishermen attempting to violate the blockade and imposed only the very broad criterion of whether the fishermen were "likely" to aid the enemy. This gave the blockading forces a great deal of discretion, because virtually anything, including fish, a staple food, could aid a blockaded enemy. It appears that the Secretary was less concerned with questions of international custom in this area than with maintaining an effective blockade, although he may have gained the impression from Rear Admiral Sampson that the only persons fishing in the West Indies were Spanish naval reservists. In any event, the question of the immunity from capture of small fishing vessels evidently was not considered during the planning of the American blockade.<sup>75</sup>

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72. Letter from Rear Admiral Sampson to Secretary Long (Apr. 28, 1898) in *Navy Report Appendix*, *supra* note 53, at 178.

73. The friend was the noted Henry Lee Higginson, who wrote Secretary Long that "[a] petition to the President that 'seizures upon the seas of private properties of Spaniards be prohibited' is brought to me for circulation," and asked Long what he should do with the petition. Such a prohibition would certainly have covered the cargoes of the *Paquete Habana* and *Lola*, and would seem to have covered even privately owned contraband. There is no record of Secretary Long's reply. Letter of H.L. Higginson to Secretary Long (Apr. 28, 1898) in J. LONG, *THE PAPERS OF JOHN DAVIS LONG, 1897-1904* at 107-08 (1939).

74. Letter from Secretary Long to Rear Admiral Sampson (Apr. 30, 1898) in *Navy Report Appendix*, *supra* note 53, at 178.

75. The question initially arose in a message from a combat commander at the outset of war, but in a muddled fashion that did not clearly present the basic immunity ques-

Nonetheless, the fishing vessel immunity question ultimately provided the basis for *The Paquete Habana*. Two of the fishing vessels mentioned by Rear Admiral Sampson in his letters to Secretary Long were the *Paquete Habana* and the *Lola*. Both vessels were captured in the very first days of war. Even as Secretary Long replied to the Admiral, these vessels already were in Key West, beginning their trek into legal history.

#### IV. PAQUETE HABANA AND LOLA

##### A. *The Facts*

The *Paquete Habana* was a sloop, forty-three feet long, displacing twenty-five tons. She was owned by Justa Galban, a woman of Spanish descent living in Havana, and captained by Juan Pasos, also a Cuban of Spanish descent. In addition to Pasos she carried a crew of three men. Neither Pasos nor the ship had any commission, both had only a license from the Spanish government to fish.<sup>76</sup> The ship left Havana on March 25, 1898, and proceeded to Cape San Antonio, where the crew fished for twenty-five days before sailing back to Havana with a cargo of forty quintals, or about 8,800 pounds, of live fish.<sup>77</sup>

Out on the sea, the ship and its crew were isolated from society and world affairs. By the time the fishermen began their return journey, the blockade of the northern coast of Cuba was in effect. On April 25, 1898 — the first day of the war — the *Paquete Habana* was captured off Mariel, near Havana, by the gunboat U.S.S. *Castine*.<sup>78</sup> It was undisputed

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tion. See *supra* text accompanying note 72. The treatment of fishing vessels was not clarified prior to the end of the war. On June 25, 1898, the warship U.S.S. *Yankee* captured five small vessels off the Isle of Pines. Upon learning that they were "fishing for the Havana market," the captain of the *Yankee* ordered their destruction, "it being impractical to take these small vessels to Key West." Letter from Commander W. H. Brownson to Rear Admiral Sampson (June 27, 1898) in *Navy Report Appendix*, *supra* note 53, at 218. Arguably, this violated Sampson's instructions of June 11, 1898, which permitted destruction only if "controlling reasons" were present, and if the ship could not be appraised and sold on the spot. See *supra* note 71. The likely reason for the destruction was the lack of a prize crew. Commanders in the blockading fleet complained of the lack of ships and the difficulty of interdicting coastal commerce with heavy-draft seagoing vessels. See Letter from Commander W.H. Brownson to Rear Admiral Sampson (June 27, 1898) in *Navy Report Appendix*, *supra* note 53, at 218; Letters from Commodore J.A. Howell to Rear Admiral Sampson (July 17 & 27, 1898) and to Secretary Long (July 27, 1898) in *Navy Report Appendix*, *supra* note 53, at 256-60; Letter from Commander Richardson Clover, U.S.S. *Bancroft*, to Rear Admiral Sampson (Aug. 9, 1898) in *Navy Report Appendix*, *supra* note 52, at 289-92. Although the blockade had some economic effect upon the poorer classes of Havana, it did not starve the Spanish army into submission; United States forces had to fight several sharp land actions to defeat the Spaniards. J. LONG, *supra* note 51, at 234-36.

76. Deposition of Juan Pasos at 10, *The Paquete Habana*, 175 U.S. 677 (1900).

77. Affidavit of Juan Pasos, at 14, *The Paquete Habana*.

78. Appeal at 3-4, *The Paquete Habana*; *Annual Report of the Navy Department for the Year 1898* at 331 [hereinafter cited as *Navy Dept. Report*]. The U.S.S. *Castine* had left Key West on April 21, 1898, for blockade duty and returned on May 3, 1898.

that, at the time of the capture, the crew of the Paquete Habana knew nothing of the blockade or the war. The humble nature of the mariners involved was evident by the size of the ship and crew, the crews' wages of a share of the catch rather than money, and the reply of Captain Pasos when asked whether he had written anything down about the capture. His reply was, "I cannot write much."<sup>79</sup> Although the crew was ignorant of the blockade and the ship was not suited for naval combat, both crew and vessel immediately were taken to Key West for adjudication. On April 27, 1898, a libel was filed against the vessel by the United States Attorney for the Southern District of Florida.<sup>80</sup>

The Lola was a larger ship than the Paquete Habana, and was returning from a longer journey when she ran afoul of the blockade. She was a two-masted schooner, fifty-one feet long, displacing thirty-five tons, owned by Severo Gonzales, a Cuban born in Spain. She was captained by Tomas Betancourt, a Spanish subject living in Havana. In addition to Betancourt, the Lola carried a crew of five. Neither Betancourt nor the ship had any license or commission.<sup>81</sup> The Lola departed Havana on April 11, 1898, eleven days prior to President McKinley's proclamation of the blockade, and proceeded to Campeche Sound, off the coast of Mexico's Yucatan Peninsula. After taking in some 10,000 pounds of live fish in eight days, the Lola set course for Havana.<sup>82</sup>

On April 26, 1898, the Lola was stopped near Havana by the U.S.S. Cincinnati.<sup>83</sup> Upon learning the Lola knew nothing of either the blockade or the war, the Cincinnati warned her not to try entering Havana; instead, Betancourt was told he could land at Bahia Honda, a smaller Cuban port. The Lola accordingly changed course for the latter port.<sup>84</sup> The next morning, off Bahia Honda, she was captured by the unarmored cruiser U.S.S. Dolphin.<sup>85</sup> She, like the Paquete Habana, was taken into Key West and libeled as a prize.

As the nearest American port to the Cuban blockade, and the seat of

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*Navy Dept. Report* at 331. Although she was a giant compared to the Paquete Habana, being 204 feet long, displacing 1,177 tons, and armed with eight four-inch rifles and four six-pounders, she illustrated the motley, improvised nature of the blockading fleet. Deficient in stability as originally designed, she had been altered to take a lighter armament. A contemporary nonetheless described her as a "single-screw vessel, weak and unsatisfactory." 2 U.S. NAVY, DICTIONARY OF AMERICAN NAVAL FIGHTING SHIPS 50 (1963); H. WILSON, THE DOWNFALL OF SPAIN 53 (1900).

79. Affidavit of Juan Pasos at 11, *The Paquete Habana*.

80. Appeal at 3-4, *The Paquete Habana*.

81. Deposition of Tomas Betancourt at 9, *The Paquete Habana*.

82. *Id.* at 10.

83. *Navy Dept. Report, supra* note 78, at 332.

84. Deposition of Tomas Betancourt at 10-11, *The Paquete Habana*.

85. *Id.* at 3-4. The U.S.S. Dolphin was larger than the U.S.S. Castine, displacing 1,486 tons and being 256 feet long. She was, however, also lightly armed (two four-inch guns and five three-pounders) and her lack of real fighting power is evident from her subsequent service to the Secretaries of the Navy as a yacht. 2 U.S. NAVY, DICTIONARY OF AMERICAN NAVAL FIGHTING SHIPS 285 (1963).



a United States District Court, Key West was the center of prize adjudication throughout the war. One observer wrote, "Key West harbor at this time was full of shipping. The masts of the Spanish prizes rose like a forest."<sup>86</sup> Thus, it was not surprising that the *Paquete Habana* and the *Lola* had to wait some weeks for a hearing.

The cases came before District Court Judge James W. Locke<sup>87</sup> on May 23, 1898, and decrees of condemnation were entered, evidently by default. The masters of these ships, speaking little English, untrained in law, not represented by counsel, and in the midst of a foreign proceeding, did little in their own defense. Fortunately, Joseph Parker Kirlin entered the case as counsel for the *Paquete Habana* and the *Lola*. Although it is not known exactly how he became involved in these cases, Kirlin was well on his way to legal prominence of such a degree that he was described after his death as "the undisputed leader of the Admiralty Bar."<sup>88</sup>

Kirlin entered the litigation sometime between May 23, 1898, when the decrees of condemnation were entered, and May 28, 1898. On the latter date Judge Locke entertained motions from him in both cases, asking that the decrees affecting both the *Paquete Habana* and the *Lola* be vacated on the basis that, under general law and the presidential proclamation of April 26, 1898, the fishing boats were not lawful prize.<sup>89</sup> Judge Locke denied the motions in decrees of May 30, 1898, stating that the court, "not being satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure,"<sup>90</sup> ordered condemnation, forfeiture, and sale of the vessels and cargo.<sup>91</sup>

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86. W. GOODE, WITH SAMPSON THROUGH THE WAR 53 (1899).

87. Judge Locke (1837-1922), who had been the District Judge for the Southern District of Florida at Key West since 1872, had an interesting career. Born in Vermont, he enlisted in the navy as a paymaster's clerk in 1861, and was mustered out at Key West in 1865. Evidently liking Key West, he stayed there to practice law, and served as a county judge and in the Reconstruction legislature before President Grant appointed him to the federal bench. This carpetbag Republican far outlasted Reconstruction, serving as District Judge for 40 years until his resignation in 1912. Obituary, *New York Times*, Sept. 7, 1922, at 17.

88. Maritime Law Association of the United States, Annual Meetings 1932-39, Appendix II, Annual Report of the Secretary 1608 (May 11, 1928); see also J. WOOLSEY, T. JONES, & C. CLARK, MEMORIAL OF JOSEPH PARKER KIRLIN, 1861-1927 (1928). Kirlin was educated at the University of Virginia and Columbia Law School. He probably reached the apogee of his legal prominence in the decade 1910-1920, when he represented the White Star Line after the sinking of the *Titanic*, see *The Titanic*, 209 F. 501 (S.D.N.Y. 1913); Cunard after the sinking of the *Lusitania*, see *The Lusitania*, 251 F. 715 (S.D.N.Y. 1918); and the Guaranty Trust Company in *The Kronprinzessin Cecilie*, see *The Kronprinzessin Cecilie v. Guaranty Trust Co.*, 244 U.S. 12 (1917), and served as General Counsel for the Shipping Control Committee during World War I.

89. Record at 13, *The Paquete Habana*, 175 U.S. 677 (1900); Record at 12-14, *The Lola*, 175 U.S. 677 (1900).

90. Record at 15, *The Paquete Habana*; Record at 14, *The Lola*.

91. Record at 15, *The Paquete Habana*; Record at 14, *The Lola*. American prize stat-

Although the record of the argument and holding is quite sketchy, the basic issues that would concern the Supreme Court had been aired during the argument over this motion. The basic issues were: whether the present state of international law exempted fishing vessels from capture; whether a United States court could take cognizance of international law in the absence of a treaty or statute; and whether the exemption of fishing vessels was established in international law.<sup>92</sup>

Thereafter, the vessels disappear. They were auctioned, apparently in July or August of 1898, by United States Marshal John F. Horr. The *Paquete Habana* brought \$490 and the *Lola* \$800.<sup>93</sup> On August 15, 1899, Kirlin filed appeals in both cases with the Supreme Court.<sup>94</sup> The two cases were consolidated; only one set of briefs and arguments, and one record, appear from that date forward.

### B. *The Argument*

Kirlin, in his appeal, made four assignments of error by the district court. The first was a basic point of international law: The fishing vessels were not subject to condemnation as lawful prize. The second point

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utes in 1898 had not changed a great deal in a century. The original statute of 1800, Act of April 23, 1800, §§ 6-7, 2 Stat. 45, overhauled during the Civil War, Act of June 30, 1864, 13 Stat. 306, established a complex pyramid of fractional shares, in which proportions officers and crew shared in the proceeds from the condemnation and sale of prizes. The United States Treasury Department took half if the prize was of inferior force to the captor, as in *The Paquete Habana*; if an American warship captured an enemy prize of superior force, the Treasury took nothing. F. UPTON, *THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR* 484 (1863). In addition to the proceeds of sale, captors could in 1898 receive bounty or prize money. These were statutory allotments from the Treasury, bounty being based upon the number of enemy sailors and the superior/inferior force idea, and prize money upon the value of the captured ship. Neither was involved in *The Paquete Habana*, and both were abolished in 1899. Knauth, *Prize Law Reconsidered*, 46 COLUM. L. REV. 69, 70-71 (1946); see J. STORY, *NOTES ON THE PRINCIPLES AND PRACTICE OF PRIZE COURTS* (F. Pratt ed. 1854).

92. Record at 15, *The Paquete Habana*; Record at 16, *The Lola*.

93. Record at 16, *The Paquete Habana*; Record at 14-15, *The Lola*. The fish were not sold, there evidently being no market for them at Key West; instead they were eaten by the crews of the smacks and revenue cutters or were thrown away.

94. Record at 20-22, *The Paquete Habana*; Record at 16-17, *The Lola*. It is reasonable to inquire what could motivate an alien owner with only \$490 at stake (in the case of *Justa Gaban*) to pursue protracted and expensive litigation in the highest court of a foreign nation. Although the value of money was much higher then, that alone does not answer the question. There appear to be two reasons for pursuing these cases to the Supreme Court. First, in capture without probable cause, the captors are liable for damages, costs, and expenses. J. STORY, *supra* note 91, at 39-43. If it were held that international law prohibited the capture of such vessels, the owners would recover substantially more than the auction price, particularly because there was argument over the valuation of the vessels at auction. See *infra* notes 199-210 and accompanying text. Second, this was a test case for a great number of such vessels captured during the war. This is apparent from the fact that Kirlin, in the second *Paquete Habana* case, represented the claimants of 12 different vessels. 189 U.S. 453 (1903). Clearly, much more was at stake in an economic sense than two smacks and some fish.

was based on a statement made in President McKinley's proclamation of April 26, 1898, that the war should be conducted in accordance with the recent practice of nations, which Kirlin maintained did not include seizure of fishing vessels. The third point was one that counsel for both sides would address before the Supreme Court. Kirlin claimed the joint resolution of April 20, 1898, had recognized Cuban independence; therefore, the fishing vessels were neutral, not enemy property. His final point embraced a technicality of admiralty practice. Kirlin claimed the district court had erroneously excluded evidence regarding the immunity of the vessels.<sup>95</sup>

The Court also raised *sua sponte* a jurisdictional issue that it asked the parties to brief and argue. R.S. 695,<sup>96</sup> a statute dating to the Civil War, permitted direct appeal to the Supreme Court in a prize case if \$2,000 was involved or if the district court certified the question involved in the case as one of general importance. Neither of these criteria was met in *The Paquete Habana*. The Act of March 3, 1891,<sup>97</sup> however, which established the circuit courts of appeals, stated that direct appeals could be taken to the Supreme Court from final decrees in prize cases. The Act imposed a \$1,000 jurisdictional limit for Supreme Court appeals in "cases not hereinbefore made final."

On October 9, 1899, Assistant Attorney General Henry M. Hoyt,<sup>98</sup> who argued the case for the United States, filed a brief on the issue of jurisdiction. Hoyt contended that the \$1,000 jurisdictional limit only applied to cases made final in the circuit courts of appeals. *The Paquete Habana* had come from district court; thus the old \$2,000 limit in R.S. 695 applied. Because \$2,000 was not at stake in *The Paquete Habana*, Hoyt argued that the Supreme Court did not have jurisdiction.<sup>99</sup>

Hoyt also addressed two nonjurisdictional issues raised by the Court. First, to the question of whether the owners of the vessels were too wealthy to come within the class of "poor fishermen" for whom the exemption was available (a query which assumed the existence of some sort of exemption), Hoyt replied that economic status would not affect immunity; however, Hoyt argued that other facts identified the owners as members of the ruling Spanish population—not the Cuban insurgents—and that further proof of the owners' adherence to the Cuban cause was improper.<sup>100</sup> This argument adverted to Kirlin's allegation that the own-

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95. Record at 20-21, *The Paquete Habana*; Record at 16-17, *The Lola*.

96. Act of June 30, 1864, ch. 174, § 11, 13 Stat. 310 (codified at R.S. § 695 (1878)).

97. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

98. Henry Hoyt (1856-1910) was born in Pennsylvania, the son of a Governor of that state. Educated at Yale and the University of Pennsylvania Law School, he served as Assistant Attorney General from 1897-1903, and Solicitor General from 1903-09. MARQUIS—WHO'S WHO, WHO WAS WHO IN AMERICA, 1897-1942 at 599; New York Times, Nov. 21, 1910, Obituary at 9.

99. Brief for United States on The Question of Jurisdiction at 1-5, *The Paquete Habana*.

100. *Id.* at 6-7.

ers were neutrals. Second, in response to the question of whether a French cruiser, after 1778, could have made a valid prize of an American vessel, Hoyt noted that France had entered the Revolutionary War on the American side in 1778. Therefore, a French cruiser could not have made a valid prize of an American vessel, because the United States had a flag and belligerent rights that were recognized by France.<sup>101</sup> A French cruiser, however, could have made a valid prize of an American vessel that was flying a British flag, because the American vessel would have been deemed a Tory ship and thus an enemy.<sup>102</sup> Hoyt argued that the circumstances of the captures at issue in *The Paquete Habana* were analogous to the hypothetical capture by a French cruiser of an American vessel sailing under a Tory flag. Neither the *Paquete Habana* nor the *Lola* flew the Cuban flag;<sup>103</sup> instead, both vessels regularly sailed under the Spanish flag.<sup>104</sup> Therefore, the indicia of the vessels showed their enemy character.<sup>105</sup>

The position taken by the United States was that Cubans, by virtue of their status as Spanish subjects, were alien enemies and thus their vessels were good prizes unless they openly adhered to the Cuban cause.<sup>106</sup> The crews of vessels, out of fear of the Spanish, or for other reasons, had not done so. Therefore, they were enemies, and no further evidence should be allowed to prove otherwise.

In his brief, Kirlin advanced four lines of argument. First, he contended that international law did not sanction the capture and condemnation of boats exclusively engaged in coastal fishing.<sup>107</sup> He cited President McKinley's April 26, 1898, proclamation,<sup>108</sup> including its adherence to the Declaration of Paris, as evidence that the United States intended to follow the principles of modern international law in waging the war. Although there were few judicial decisions and no American statutes or treaties dealing with the immunity of coastal fishing vessels, Kirlin argued that the actions of governments and the almost uniform opinions of publicists provided sufficient evidence that such immunity existed as a rule of international law. Kirlin cited Lord Phillimore in *The Queen v. Keyn*<sup>109</sup> for the proposition that the opinions of jurists are good evidence of what is international law. Kirlin also quoted Froissart's *Chronicles*<sup>110</sup> and Henry IV's Order of 1406,<sup>111</sup> granting his protection to fishermen, as evidence of the rule's ancient origins. Kirlin included an

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101. *Id.* at 7.

102. *Id.*

103. *Id.* at 7.

104. *See The Paquete Habana*, 175 U.S. 677, 678 (1900).

105. Brief for United States on The Question of Jurisdiction at 8, *The Paquete Habana*.

106. *Id.* at 5-6.

107. Brief for Appellants at 7, *The Paquete Habana*.

108. *Id.*

109. 2 Ex. D. 63, 68-70 (1876).

110. 3 J. FROISSART, FROISSART'S CHRONIQUES 41 (1824).

111. *See* 8 T. RYMER, RYMER'S FOEDERA 451 (1406).

examination of the manner in which the rule had been treated during the nineteenth century. The only adverse English precedent, *The Young Jacob and Johanna*,<sup>112</sup> was distinguished as involving spying by fishing boats; moreover, English Orders in Council of 1806 subsequently had restored the immunity.<sup>113</sup> He cited the French case *La Nostra Signora de la Piedad*<sup>114</sup> to present the continental opinion that immunity for coastal fishing vessels was a binding rule of international law. In addition, Kirlin cited many nineteenth century writers on international law in order to show a consensus that the rule existed and gave examples of French actions in the Crimean and Franco-Prussian Wars and Japanese actions in the Sino-Japanese War as evidence of recent practice.<sup>115</sup> He asserted that an exemption for fishing boats was allowed by the United States during the Mexican War. Kirlin also made the assertion that, prior to Secretary Long's April 30, 1898, letter to Rear Admiral Sampson,<sup>116</sup> instructions had been given not to harm fishing boats. Kirlin admitted, however, that he had no proof of this, and in view of the numerous captures at the outbreak of the war, the assertion seems somewhat dubious. Finally, Kirlin pointed out that the officers and crews of the vessels lacked knowledge of the blockade and the war and thus could not have intended to participate in the hostilities or aid the enemy.<sup>117</sup>

Second, Kirlin argued that the Cubans had been recognized by Congress and, therefore, they should have been treated either as neutrals or as allies. This argument, premised on language contained in the joint resolution, stated that the courts had no power to make determinations of the existence of states of war, belligerency, independence, and the like; these were political questions upon which the courts must defer to the judgment of the political branches.<sup>118</sup> In Kirlin's words, "[t]he recognition of the freedom and independence of a whole people must of necessity regard them as a state for all purposes of war, and the use of the expression the 'people of Cuba' in the joint resolution of Congress must certainly have had that effect."<sup>119</sup> Kirlin also emphasized that the owners and mariners of the ships in question were domiciled in Cuba and hence were "Cubans" within the meaning of the joint resolution.<sup>120</sup> In making this argument, however, Kirlin completely ignored the principle, established in the United States at the time of Washington's presidency, that recognition of a foreign state or government is the exclusive prerogative

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112. 1 C. Rob. Adm. 20 (1798).

113. Brief for Appellants at 12-13, *The Paquete Habana*.

114. 2 F. DECUSSY, *CAUSES CELEBRES DU DROIT MARITIME* 166 (1856).

115. See generally Brief for Appellants at 16-33, *The Paquete Habana*.

116. Letter from Secretary Long to Rear Admiral Sampson, *supra* note 74.

117. Brief for Appellants at 35, *The Paquete Habana*.

118. *Id.* at 37.

119. *Id.* at 35.

120. *Id.* at 48-49.

of the executive.<sup>121</sup> Because it was an action of Congress, the joint resolution could have no effect upon American recognition of Cuba. Only President McKinley could receive envoys and recognize governments, and he had not done so with Cuba. The insulting demands in the joint resolution could provoke war, but they could not recognize Cuba. The government, possibly for political reasons, did not use the doctrine of exclusive executive prerogative to refute Kirlin's argument; instead, all parties focused on issues of recognition/nonrecognition and enemy versus ally or neutral status.<sup>122</sup>

Kirlin's third argument addressed the owners' statuses as enemy or nonenemy in the Cuban insurrection.<sup>123</sup> The mere operation of the fishing boats under the Spanish flag did not raise a presumption of hostility, he argued; instead, all situational factors such as ownership, cargo, and circumstances, had to be considered.<sup>124</sup> There was no requirement that the mariners invite Spanish confiscation by flying the insurgent Cuban flag. Because the crew had no knowledge that war had broken out and therefore no hostile intent, the presence of the Spanish flag was not sufficient to give the ships a hostile character.<sup>125</sup> Moreover, prize practice at the outbreak of war allowed neutrals or friends to communicate with their vessels and remove the enemy flag, without condemnation, as long as laches was not present.<sup>126</sup> Finally, he reiterated that further proof of the owners' Cuban sentiments should be allowed.<sup>127</sup>

Kirlin's fourth argument concerned the question of damages. Citing

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121. *National City Bank of New York v. Republic of China*, 348 U.S. 356, 358 (1955); see *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 319-21 (1936).

122. McKinley had signed the joint resolution on April 20, 1898. Although it is true that approved joint resolutions have the force and effect of law, see *International Bhd. of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1163 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 906 (1973), it is quite a different matter to say that the April 20, 1900, joint resolution recognized Cuba. Its terms were hortatory, as Hoyt was to point out, and the joint resolution was essentially a Congressional action ratified by a President who had given Congress *carte blanche*. Brief for the United States at 6, *The Paquete Habana*. More importantly, following the joint resolution, McKinley took no action consonant with recognition of Cuban independence. He did not send or receive envoys, or deal with a Cuban government; instead, the island simply exchanged an inefficient Spanish military occupation for a more efficient American one. Prior to the joint resolution, the United States had not recognized the Cubans as belligerents. See *The Three Friends*, 166 U.S. 1 (1897). Recognition of such a status, however, would not, of itself, have implied any recognition of a Cuban state. See Beale, *The Recognition of Cuban Belligerency*, 9 HARV. L. REV. 406, 406-07 (1896). In fact, recognition of Cuba by the United States and other nations did not take place until 1902, following arrangements which allowed American intervention in Cuban affairs to protect American interests. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1902, at 320-26 (1903).

123. Brief for Appellants at 49-50, *The Paquete Habana*.

124. *Id.* at 49.

125. *Id.* at 50.

126. *Id.* at 52-55 (citing the Civil War cases of *The William Bagaley*, 72 U.S. (5 Wall.) 377 (1866) and *The Grey Jacket*, 72 U.S. (5 Wall.) 342 (1866)).

127. Brief for Appellants at 55, *The Paquete Habana*.

Justice Story, he argued that capture was at the captors' peril.<sup>128</sup> If there are no just grounds for capture, damages may be assessed against the captor. In *The Paquete Habana*, there was no probable cause for capture because it was widely known that fishing vessels were exempt; accordingly, the captures were premature, because they had preceded notice of the existence of war (this was not the case in *The Lola*) and the ships' papers showed that the owners were Cubans.<sup>129</sup> Emphasizing the hardship that the captures had imposed on the owners of small vessels, Kirlin stated that the "fullest reparation must be made."<sup>130</sup>

Kirlin's brief was a creditable performance. He did an excellent job of searching legal precedent and literature to show the status of the exemption in international law. Although there were serious problems with his arguments based upon Cuban "nationality," Kirlin was certainly very thorough. As an experienced advocate in an uncertain area of law, he made every reasonable argument for his clients.

The government's brief on the merits, filed by Hoyt, raised two principal issues: whether, as a matter of general law, fishing vessels were exempt from capture; and whether the Cuban owners were entitled to the rights and privileges of neutrals.<sup>131</sup> Hoyt began with his strongest argument — that the crews were neither allies nor neutrals. Emphasizing that there was no proof the owners or the crews were in sympathy with the Cuban insurgents, he argued that they could not therefore be belligerent allies. Nor could they be neutrals, because the taking of provisions into Havana was not a neutral act.

Hoyt also attacked Kirlin's interpretation of the language of the joint resolution as providing for recognition of Cuba. Although Hoyt did not make the point that Congress *qua* Congress was powerless to recognize Cuba, he did acknowledge its presumptuous nature: how could a declaration of the American Congress, "one part of which certainly was not in strict accordance with the existing fact, terminate violently and abruptly the previous national ties of another people over whom we possessed no rights and exercised no control[?]"<sup>132</sup> Hoyt argued that Congress had neither recognized Cuba nor intended to do so. He argued that the joint resolution was a demand on Spain and a statement of the belief that Cuba "ought to be" free and independent. It followed that the status of the Cuban owners as Spanish subjects was unchanged in international law by the joint resolution.<sup>133</sup>

This argument was logical and far more in accord with American practice than was Kirlin's insistence that Congress had recognized Cuba. By arguing that Congress had not intended to recognize Cuba, Hoyt

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128. *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818).

129. Brief for Appellants at 58-59, *The Paquete Habana*.

130. *Id.* at 59.

131. Brief for the United States at 5, *The Paquete Habana*.

132. *Id.* at 6.

133. *Id.*

achieved two objectives. First, he avoided branding Congress with attempting an unconstitutional act and avoided criticism, as a McKinley administration official, of congressional action the administration had invited the previous year. Second, he refuted the contention that the Cubans, who were not recognized by the Executive, were neutrals or allies.

Hoyt cited a number of Civil War cases, notably the *Prize Cases*<sup>134</sup> and *Mrs. Alexander's Cotton*,<sup>135</sup> for the proposition that all persons who reside in enemy territory and do not remove themselves on the outbreak of war are enemies and will be treated as such, without inquiries into individual sentiments. Because Cuba was not independent, it continued to be Spanish and, therefore, enemy territory. Hence, the Cuban owners of the vessels were alien enemies.<sup>136</sup> Finally, Hoyt argued that the language of President McKinley's April 26, 1898, proclamation did not change United States policy; references in the proclamation to modern practice in international law related to the specific subjects that followed, the "days of grace" and the Declaration of Paris.<sup>137</sup>

Hoyt's second contention addressed the primary question of whether an exemption for fishing vessels existed in international law. He began by admitting that some exemption existed. He posited that the exemption existed for humanitarian reasons, or because of the insignificance of the property involved.<sup>138</sup> Hence, the fishing vessels at issue did not fall within the ambit of the exception because they were relatively large vessels capable of remaining at sea for some time. Moreover, Hoyt argued that when two warring nations are essentially contiguous, as are Britain and France, such small boats will frequently be in the area of operations, and humanity would dictate an exemption. When the combatants are widely separated, however, practical considerations stand in the way of taking such small vessels in for adjudication.<sup>139</sup> Because the United States and Cuba are essentially contiguous, and a prize court located in Key West was functioning, it is difficult to see what Hoyt hoped to achieve with these contentions.

Hoyt then contrasted continental practice, which regarded the exemption as "tolerably well-fixed," with English practice, which regarded the exemption as discretionary and requiring executive or treaty action.<sup>140</sup> Hoyt argued the United States followed the English practice and no ordinance or treaty existed to bind the United States to a practice that exempted fishing vessels from capture. Returning to the question of vessel size, Hoyt claimed that the vessels were too large to come within the

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134. 67 U.S. (2 Black) 635 (1863).

135. 69 U.S. (2 Wall.) 404 (1865).

136. Brief for the United States at 6-9, *The Paquete Habana*.

137. *Id.* at 9.

138. *Id.* at 9-10.

139. *Id.*

140. *Id.* at 11.



exemption, and he argued that the development of deep-sea fishing had negated the reason for the exemption.<sup>141</sup> This curious argument ignored not only the obvious existence of the coastal fishermen whose status was at issue, but also Kirlin's assertion that there was a *growing* international consensus in favor of the exemption.<sup>142</sup>

Hoyt cited *The Young Jacob and Johanna*<sup>143</sup> to emphasize the English view that the exemption was one of comity only, which required positive executive action for its implementation. He attempted to refute Kirlin's extensive list of jurists and publicists who supported the rule by portraying them as mere theorists:

[I]t must be remembered that the writers on international law — and especially the Continental writers on international law — are far in advance of legislation, as well as of decisions of the courts; that while the English law writers are more sober in their statements, and have greater regard for the rights of belligerents, even they do not express the English law as it is, but rather as they conceive it ought to be; and that in looking to any foreign rule for our guidance, we properly regard, where our own practice and law are silent on the question, the decisions of the English courts, and not the speculations of writers on international law, either English or Continental.<sup>144</sup>

This statement, betraying a masked discomfort with any "law" that was not positive legislation, exhibited a common lawyer's puzzlement over the place of the writings of jurists and publicists in the international law system. More immediately it showed a basic misunderstanding of Kirlin's strategy. Kirlin had not attempted to ventilate advanced academic opinion; instead, he had attempted to show, through a variety of sources, what the developing international law actually was.

Hoyt again digressed on the differences between the "hypothetical" views of writers and the actual law and the difference between the English and French approaches. He argued that there were no limits on the exemption as to the size of the ship and crew, the distance from the shore of the vessel, and the length of time the ship could stay at sea.

After citing other writers on the existence of the exemption and international adherence to it, Hoyt then readdressed the question of the Cubans' status and reiterated the arguments he had made earlier in the brief about the intent and effect of the joint resolution. In retrospect, one statement made in this part of the brief is particularly noteworthy. Although it did not make any new legal argument, the statement foretold, to some degree, the complications associated with future American involvement in foreign insurrections:

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141. *Id.* at 12-13.

142. *Id.* at 15-16.

143. 1 C. Rob. Adm. 20 (1798).

144. Brief for the United States at 16, *The Paquete Habana*.

The belligerency of the Cubans was never recognized unless by the resolution of April 20; that resolution did recognize their independence by stating that the Cubans were and ought to be free and independent, a somewhat inconsistent statement as applied to another people who might not be willing to fight for their independence as a people . . . . Did such a recognition of independence under these circumstances make the Cuban people a State? There is not yet a Cuban State in the list of nations, and we are still necessarily carrying on the government of that island by a military administration.<sup>145</sup>

After this perceptive sally, Hoyt muddled the waters and spent some of the force of his argument by arguing that the joint resolution was a political act which affected only the Cubans' political status, not the private rights involved in prize matters.<sup>146</sup> This contradicted his earlier and more logical argument that the resolution had no political effect at all; it also ignored the fact that by virtue of its status as a branch of public international law, prize law could not be divorced from politics and public affairs. Finally, he concluded his brief with an indirect attack upon Kirlin's damages argument, maintaining that the Navy had acted in complete good faith in making the captures.<sup>147</sup>

The government's brief was a mixed effort. Hoyt in the earlier sections of the brief brilliantly refuted Kirlin's contentions regarding the Cubans' nationality and the effect of the joint resolution. When addressing the question of whether the exemption from capture was part of customary international law, however, Hoyt's arguments were diffuse, evasive, ill-organized, and based on misunderstandings of both customary international law and the strategy Kirlin was pursuing through his citation of authority.

The Supreme Court heard oral argument in *The Paquete Habana* on

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145. *Id.* at 28.

146. *Id.*

147. *Id.* at 32-33. Two other briefs were filed prior to the oral argument by counsel who did not participate in the argument. Joseph K. McCammon and James H. Hayden filed a brief that emphasized the "expediency and humanity" interests underlying the exemption, and argued that the *Paquete Habana* and *Lola* were "staunch, seaworthy" vessels capable of staying out for weeks. Brief for Captors, Nov. 7, 1899, *The Paquete Habana*. The brief went on to argue that the owners of the vessels did not use them for personal livelihood; instead, the vessels were chartered out as investments. Hence, the owners hardly came within the class of poor fishermen that the rule was meant to benefit. The brief emphasized the difference between English and continental practice, averring that the European writers were of no value as authorities to an American court. *Id.* at 5-6. The brief then reiterated Hoyt's arguments that the Cuban crew members were enemies, placing particular emphasis upon their remaining in Havana throughout the insurrection, and argued that further proofs were not warranted because there were no questions of fact in the case. *Id.* at 9-11. George A. King and William B. King filed a brief for certain captors who were not otherwise identified. This brief reiterated the arguments that domicile controlled status, and therefore the Cuban owners were alien enemies. Brief for Certain Captors, Nov. 7, 1899, at 1-7, *The Paquete Habana*.

November 7-8, 1899. Although there is no account of the argument, one issue which clearly concerned the Court was Kirlin's assertion that there was American precedent from the Mexican War for the exemption of fishing boats. This is apparent because on November 11, 1899, Hoyt filed a "Statement" on the subject.<sup>148</sup> This curious document began with the assertion that no American writer confirmed the exemption, and that the Treaty of Guadeloupe Hidalgo,<sup>149</sup> which had ended the Mexican War in 1848, operated prospectively only and protected "persons, not their property." Hoyt admitted, however, that a search of formerly confidential Navy correspondence had revealed a letter of May 14, 1846, from Commander Conner of the Home Squadron, stating that Mexican coastal fishermen would not be molested.<sup>150</sup> The letter had been favorably endorsed on June 10, 1846, by the historian George Bancroft, then serving as Secretary of the Navy.<sup>151</sup> This revelation, which confirmed Kirlin's argument and was an important precedent, was somewhat embarrassing to the government. Hoyt tried to minimize the damage by pointing out that later in the war Commodore Stockton had ordered the Navy to capture all Mexican vessels off the coast of California. Stockton's action, as opposed to that of Connor, however, had not received executive approval. Hoyt reiterated the English view that positive executive action was necessary for the exemption to apply, and pointed out that regardless of Commander Conner's correspondence, the Executive had taken no such action to trigger the exemption in the Spanish-American War.<sup>152</sup> Hoyt clearly was surprised by the uncovering of this precedent, and his Statement seems both hastily written and contradictory.

Kirlin also filed a supplemental brief on November 13, 1899.<sup>153</sup> In it he addressed the jurisdictional issue, arguing that the 1891 Circuit Court of Appeals Act had repealed the \$2,000 jurisdictional limit of R.S. 695,<sup>154</sup> and, consequently, direct appeals could now be taken to the Supreme Court from final decrees in prize cases, regardless of the amounts at issue. Also, he addressed the Cuban nationality issue, arguing in a rather circular manner that the owners were "Cubans" because they lived in Cuba, that the joint resolution brought them within its ambit, and that there was no need to prove the owners had sympathized with the insurgents because the language of the joint resolution specifically distinguished Cubans from Spaniards. Finally, he reminded the Court that the government itself had confirmed the existence of American pre-

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148. Statement on Behalf of the United States Relative to Exemption Allowed to Fishing Vessels in the Mexican War at 1-4, *The Paquete Habana*.

149. Treaty of Guadeloupe Hidalgo, Feb. 2, 1848, 9 Stat. 922, T.S. No. 207.

150. Statement on Behalf of the United States Relative to Exemption Allowed to Fishing Vessels in the Mexican War at 1-4, *The Paquete Habana*.

151. *Id.* at 4.

152. *Id.* at 5.

153. Supplemental Brief for Appellants, Nov. 13, 1899, *The Paquete Habana*.

154. Act of June 30, 1864, ch. 174, § 11, 13 Stat. 310 (codified at R.S. § 695 (1878)); see also *supra* text accompanying note 95.

cedent, during the Mexican War, for the exemption.<sup>155</sup> Although none of these arguments, other than the jurisdictional argument, were new, Kirlin did respond effectively to the criticisms leveled by Hoyt concerning his use of foreign writers as evidence of the development of international law:

It is not necessary that the claimant should be able to cite an adjudicated case holding that the principle contended for is a rule of international law . . . . In a certain sense, there is no positive sanction for the rules of international law as there is for the principles of municipal law. Long observance of a rule or custom, its embodiment in treaties, its recognition in the standard text books on international law, and the justice, equity, and convenience of a principle establish it as a rule which the Court . . . may recognize and enforce. If this were not so, there could be no advancement in the principles of international law except by the great Conference of the Powers and by the most formal public Conventions; and these, we know are by no means the sources from which such principles are derived.<sup>156</sup>

When the Justices voted, Chief Justice Melville W. Fuller and the senior Associate Justice, John Marshall Harlan, were in the minority. It thus fell to the senior Associate Justice in the majority, Horace Gray, to assign the writing of the majority opinion. Gray took the opinion himself.<sup>157</sup>

### C. *The Opinion*

Justice Gray's contemporaries stressed his qualities of enormous memory and erudition, his faculty for lengthy, thorough research, and his tendency toward extensive written exposition.<sup>158</sup> He was not known for legal innovation, although, as *The Paquete Habana* would show, Justice Gray was anything but insensible to the development of law on a historical basis.<sup>159</sup> The most salient feature of his judicial behavior, one of particular importance to *The Paquete Habana*, was his inclination to

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155. Supplemental Brief for Appellants, Nov. 13, 1899, at 3-7, *The Paquete Habana*.

156. *Id.* at 8-9.

157. Justice Gray was educated at Harvard, earning an A.B. in 1845 and an LL.B. in 1849. He was admitted to the bar in 1851, and in 1854 became Reporter of the State Supreme Judicial Court, a position he held until 1860. In 1864, he was appointed an Associate Justice of the Supreme Judicial Court, and in 1873, Chief Justice. He remained on the state court until 1881, when he was appointed an Associate Justice of the United States Supreme Court. Lowell, *Biographical Note on Horace Gray* 39 *PROC. AM. ACAD. ARTS & SCI.* 627, 627-28 (1904).

158. *Id.* at 628, 632; see also George F. Hoar in 2 *MEMORIALS OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 270 (R. Jacobs ed. 1981) [hereinafter cited as *MEMORIALS*].

159. William A. Maury in *MEMORIALS*, *supra* note 158, at 304.

analyze matters in the light of historical development. A recent scholar has written:

A member of the most scholarly line on the Court — one that began with Cushing and ultimately ran through Story, Holmes, Cardozo, and Frankfurter — Gray was also the most history-centered, his reasoning to conclusions taking place more through the historical or chronological process than did that of any other member of the high court. What made Gray unique was that he was not only a legal historian observing what others did; he was a legal historian *on the bench*.<sup>160</sup>

A famous contemporary of his, Henry Cabot Lodge, said much the same thing: "He was not content with merely stating the point at issue, but in some of the decisions we find a review of the entire history of the principles involved, which falls little short of a treatise on the whole subject."<sup>161</sup>

With his predisposition to view matters historically, it is not surprising that Justice Gray, when given the opportunity to assign the majority opinion in *The Paquete Habana*, chose to write the opinion himself. The principal question — whether the exemption for coastal fishing vessels was part of customary international law — was essentially an historical one. Kirlin's brief, with its numerous citations to authority dating as far back as the fourteenth century, must have particularly appealed to him.

Justice Gray's achievement in writing *The Paquete Habana* opinion must be accounted a *tour de force* of judicial effort. The case was argued on November 7-8, 1899, and the principal briefs were filed at the same time. Notwithstanding the intervention of the Christmas holidays, Gray's opinion, which required prodigious research, was written, circulated, approved, and ready for announcement two months later on January 8, 1900.

The announcement of the decision and the reading of the opinions in *The Paquete Habana* was the main order of business on January 8, 1900.<sup>162</sup> After stating the facts of the captures and condemnations, Gray addressed the jurisdictional question that the Court had raised *sua sponte*. The Court rejected the government's contention that there was no jurisdiction because the \$2,000 limit in R.S. 695<sup>163</sup> was not met and held that the Circuit Courts of Appeals Act of 1891<sup>164</sup> had made the nature of the case, not the amount involved, the relevant criterion for

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160. Spector, *Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method*, 12 AM. J. LEGAL HIST. 181, 181 (1968); see also S. Mitchell, *Mr. Justice Horace Gray* (1962) (Ph.D. dissertation, University of Wisconsin).

161. Henry Cabot Lodge in MEMORIALS, *supra* note 158, at 285.

162. U.S. Supreme Court, *Journal of the Supreme Court of the United States, October Term, 1899*, at 77 (1900).

163. Act of June 30, 1864, ch. 174, § 11, 13 Stat. 306, 310 (codified at R.S. § 695 (1878)).

164. Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

appellate jurisdiction. The Act, by providing for direct appeal of final decrees in prize without mention of amount, had *sub silentio* repealed the jurisdictional amount of R.S. 695; the \$1,000 limit in the 1891 Circuit Court of Appeals Act applied only to certain cases which had been before a court of appeals. It followed that the Supreme Court had appellate jurisdiction over *The Paquete Habana*.<sup>165</sup>

After disposing of this threshold issue, Justice Gray focused upon the merits and phrased the issue as "whether, upon the facts appearing in these records, the fishing smacks were subject to capture . . . ." <sup>166</sup> He began by positing the basic proposition that "[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war."<sup>167</sup> Justice Gray provided an elaborate and comprehensive historical examination of this exception for coast fishermen. He analyzed decrees of Henry IV of England in the fifteenth century, and French, English, and Dutch examples of recognition of the exemption prior to American independence.<sup>168</sup> He cited the U.S.-Prussian treaty of 1785,<sup>169</sup> with its famous article exempting "scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen," from molestation in time of war, as an early American recognition of the principle.<sup>170</sup>

Justice Gray then turned to what he termed "the only serious interruptions . . . of the general recognition of the exemption,"<sup>171</sup> which occurred during the Napoleonic Wars. After detailing the chronology of events, he came to *The Young Jacob and Johanna*,<sup>172</sup> a case the government had relied heavily upon in *The Paquete Habana* for the proposition that positive executive action was needed to establish the exemption as binding.<sup>173</sup> Justice Gray distinguished *The Young Jacob and Johanna* from the present case on two grounds. First, *The Young Jacob and Johanna* was a response to a 1798 Order in Council<sup>174</sup> directing the taking of fishing vessels, which was promulgated in response to French use of such vessels in war. Second, the record in *The Young Jacob and Johanna* contained strong evidence of fraud.

Recognizing the growth and dynamism of international law, Justice

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165. 175 U.S. 677, 680-86 (1900).

166. *Id.* at 686.

167. *Id.*

168. *Id.* at 686-90.

169. Treaty of Amity and Commerce, Sept. 10, 1785, United States-Prussia, art. XXII, 8 Stat. 84, T.S. No. 292 (1785).

170. 175 U.S. 677, 690-91.

171. *Id.* at 691.

172. 1 C. Rob. Adm. 20 (1798).

173. Brief for the United States at 11, *The Paquete Habana*.

174. Order of Jan. 24, 1798, in 2 ORTOLAN 53.

Gray refuted the government's assertion that there could be no exemption without positive executive action and resolved the comity argument:

The opinion begins by admitting the known custom in former wars not to capture such vessels; adding, however, "but this was a rule of comity only, and not of legal decision." Assuming the phrase "legal decision" . . . as equivalent to "judicial decision," it is true that, so far as appears, there had been no such decision on the point in England. The word "comity" was apparently used by Lord Stowell as synonymous with courtesy or goodwill. *But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity . . . to grow, by the general assent of civilized nations, into a settled rule of international law.*<sup>175</sup>

Justice Gray also provided an exhaustive examination of nineteenth century writings and practice to illustrate that the "growth" of which he had written had in fact taken place. Beginning with the British action of 1806, which restored the ancient exception, Justice Gray canvassed the American example in the Mexican War, French custom, English conduct in the Crimea, and the policy followed by Japan during its war with China.<sup>176</sup>

Justice Gray followed his discussion of actual practice with an examination of the writings of contemporary jurists. He began this segment of the opinion with a statement that is perhaps the most often-cited passage from *The Paquete Habana*:

*International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.* For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators . . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>177</sup>

This was a clear rebuff to the government's argument that the Court should reject the "speculations" of theorists because they were not acceptable sources of law.<sup>178</sup> Justice Gray understood not only the dynamic nature of international custom, but the place of jurists and commentators in the civil and international law systems. His examina-

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175. 175 U.S. 677, 694 (emphasis added).

176. *Id.* at 694-700.

177. *Id.* at 700 (emphasis added).

178. *See supra* note 144 and accompanying text.

tion of the contemporary sources was as thorough as his historical research and included American, French, Argentine, German, English, Dutch, Austrian, Spanish, Portuguese, and Italian writers.<sup>179</sup> His conclusion exhibited this understanding:

[A]t the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity . . . and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.<sup>180</sup>

The exemption was not a universal one; it did not apply if the vessels engaged in warfare, or if naval operations created a state of military necessity "to which all private interests must give way."<sup>181</sup> Nor did it apply to deep-sea fishing vessels taking fish that were not brought fresh to market. Within its limits, however, it was an effective and binding rule of international law.<sup>182</sup>

Justice Gray refuted the proposition that positive executive action was required to recognize the exemption. He cited Justice Marshall's opinion in *Brown v. United States*,<sup>183</sup> which relied on the modern usage of nations,<sup>184</sup> and Justice Strong's statement in *The Scotia*<sup>185</sup> that "it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation . . . . Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations."<sup>186</sup>

Justice Gray closed his opinion by reviewing President McKinley's April 26, 1898, proclamation and the correspondence between Rear Admiral Sampson and Secretary Long.<sup>187</sup> Justice Gray interpreted the preamble of the proclamation as evidence of American intent to conduct the blockade in compliance with international law. He interpreted Rear Admiral Sampson's dispatch as evidence of his belief that, absent an express order to the contrary, coastal fishermen were not subject to arrest. Providing Secretary Long's reply with a more lenient interpretation than it perhaps deserved, Justice Gray viewed it as forbidding the blockade squadron from interfering with coastal fishing vessels unless the vessels

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179. 175 U.S. 677, 700-07.

180. *Id.* at 708.

181. *Id.*

182. *Id.*

183. 12 U.S. (8 Cranch) 110 (1814).

184. *Id.* at 123, 125.

185. 81 U.S. (14 Wall.) 170 (1872).

186. *Id.* at 188.

187. See *supra* notes 72, 74 and accompanying text.



were likely to aid the enemy.<sup>188</sup>

Justice Gray emphasized the facts of the case, pointing out that the *Paquete Habana* and the *Lola* were small, unarmed vessels engaged in coastal fishing. The vessels were not aiding the enemy or trying to run the blockade. Moreover, the crews were working for a share of the cargo; thus, neither vessel was a "commercial adventure." Therefore, Justice Gray concluded that the vessels came within the exemption provided by international law. The decree of the district court was reversed, and the Court ordered the proceeds of the sales restored to the claimants, with damages and costs.<sup>189</sup>

Chief Justice Fuller dissented. He was joined in his opinion by John Marshall Harlan and Joseph McKenna, the senior and junior Associate Justices. Chief Justice Fuller refused to accept Justice Gray's argument that a rule of international law, in the absence of executive or legislative action, could limit American naval activity. Chief Justice Fuller cited *Brown v. United States*<sup>190</sup> to support his proposition that some form of executive or legislative action was a necessary precursor to limitation of naval activity by a rule of international law. He noted that the *Sampson-Long* correspondence "was entirely consistent with the validity of the captures," and concluded that the captures were valid because "it is impossible to concede that the Admiral ratified these captures in disregard of established international law."<sup>191</sup> Chief Justice Fuller criticized the exemption for containing numerous exceptions and interfering with captures directed or ratified by the officer in command. He stated that, even if the rule existed, the *Paquete Habana* and the *Lola* were large and essentially commercial in nature, and, therefore, should not come within the ambit of the rule. After a few examples of contemporary practice and citations from treatises which did not treat the rule as established, Chief Justice Fuller attacked the "speculations and repetitions"<sup>192</sup> of the jurists cited by Justice Gray: "Their lucubrations may be persuasive, but not authoritative."<sup>193</sup> He summarized his opinion by stating that the Executive possessed the power to grant such exemptions, and in the absence of executive action, there was no exemption.<sup>194</sup>

#### D. *Analysis of Opinion*

Three salient points can be made with regard to Justice Gray's opinion. The first is that the opinion is an outstanding historical accomplishment. Although Kirlin had cited numerous historical sources in his

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188. *The Paquete Habana*, 175 U.S. 677, 712-13 (1900). See *supra* note 75 for the effect of Navy policy.

189. 175 U.S. 677, 714.

190. 12 U.S. (8 Cranch) 110 (1814).

191. 175 U.S. 677, 717.

192. *Id.* at 720.

193. *Id.*

194. *Id.* at 718-21.

brief, Justice Gray ranged far beyond Kirlin's citations, relying on an enormous volume of research to construct a short treatise on the subject. As one writer has commented:

*Paquete Habana* was a profound study in the modern law of maritime prizes. Few decisions in the history of the United States Supreme Court before or since present so vast a *diversity* of sources in support of an opinion. Gray seemed to creep into the most forlorn recesses of international law . . . . [His] amazing historical equipment included not merely legal material but treaties and diplomatic correspondence as well . . . .<sup>195</sup>

Henry Cabot Lodge later called the opinion "very remarkable . . . . The whole history of fishing vessels as subjects of prize in war was set forth."<sup>196</sup> The thoroughness with which Justice Gray set about his historical task was indeed astonishing. It is not surprising that there were no concurring opinions on the issue of the exemption; Justice Gray had exhausted the subject.

Second, Justice Gray's opinion relied entirely on the international law exemption argument made by Kirlin. He did not mention the arguments concerning the effect of the joint resolution on Cuba, the nationality of the owners, or the owners' allegiance to Spain, to which the parties had devoted much of their briefs. Because Justice Gray did not address these points, it was unnecessary for him to delve into the procedural questions raised by Kirlin and argued by both parties. Except for his treatment of the threshold question of jurisdiction, Justice Gray's entire opinion had one focus: proof that an exemption for coastal fishing vessels existed as a rule of international law.

Third, Justice Gray, although a nineteenth century conservative, was receptive to the potential for development of international law. Much of his opinion was devoted to showing the development of an international consensus for the exemption at issue.<sup>197</sup> Justice Gray's predilection for historical research clearly furnished him with an appreciation for continental writers and legal systems that was not shared by much of the American bar.

Chief Justice Fuller's dissent betrays a certain distrust of foreign innovations in the law and a reluctance to believe that the United States would violate international law in its warmaking. The Chief Justice was hampered by the majority's agreement to base the decision only upon the international law issue of exemption for coastal fishing vessels. Had Justice Gray dealt with the Cuban nationality issue, Chief Justice Fuller would have had more persuasive arguments at his disposal.

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195. Spector, *supra* note 160, at 206.

196. Henry Cabot Lodge in MEMORIALS, *supra* note 158, at 285.

197. See 175 U.S. 677, 686-712.

## V. REACTION AND LAWMAKING, 1900 - 1907

Following the announcement of the judgment on January 8, 1900, Hoyt filed a motion urging the Court to prohibit recovery of punitive damages. He argued that the captures were made in good faith and that the status of the exemption was not clear, stressing that the important Mexican War precedent had been hidden in obscure records.<sup>198</sup> On January 22, 1900, Kirlin filed a brief in opposition to Hoyt's motion, arguing that the matter was *res judicata*, the motion was premature, and the proceeds of the prize sale were likely less than the vessels' actual values.<sup>199</sup> On January 29, 1900, the Court granted Hoyt's motion and modified the decree to state that only compensatory damages should be awarded.<sup>200</sup>

The case was remanded to the United States District Court for the Southern District of Florida, and a commissioner was appointed to take testimony and determine the values of the vessels. An interesting result of this testimony was an indication that the vessels may actually have been more commercial than appeared in the original case. Jose Pasos, a brother of the captain of the *Paquete Habana*, testified that he, the captain, and a third brother had owned half of the *Paquete Habana* — Justa Galban owning the other half. He also testified that this investment earned them an eighteen to twenty percent return on capital per year, and that the ship was worth \$4,500 in gold.<sup>201</sup> Jose Pasos's testimony directly contradicted his brother's earlier statement that neither brother had an interest in the vessel. Severo Gonzales, owner of the *Lola*, testified that he earned a twenty-two percent return from the vessel per year and that it was worth \$5,000 in gold.<sup>202</sup> Such testimony, assuming it were true, would not have undercut Justice Gray's findings regarding the existence of an exemption in international law. Had the testimony been in the record, however, it might have led to a different outcome for the *Paquete Habana* and the *Lola*, with the Court holding that they did not come within the exemption because of their commercial nature. Justice Gray relied on the noncommercial status of the vessels to fit them within the exemption;<sup>203</sup> it is possible that he, and the majority, might have viewed the vessels differently if they had not appeared in this guise.

This is speculation, however, and the fact remained that, with the issue shifted from international law to valuation, it was in the interest of Kirlin and his clients to make the vessels appear as valuable as possible. Kirlin effectively performed this task because the *Paquete Habana* was valued at \$5,687.06, and the *Lola* at \$6,643.91.<sup>204</sup> The government ap-

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198. Motion to Modify Decree at 1-6, *The Paquete Habana*, 175 U.S. 677.

199. Brief in Opposition to Motion to Modify Decree at 1-2, *The Paquete Habana*, 175 U.S. 677.

200. 175 U.S. 677, 721.

201. Interrogatories of Jose Pasos at 27, *The Paquete Habana*, 175 U.S. 677.

202. Interrogatories of Severo Gonzales at 22, *The Paquete Habana*, 189 U.S. 453 (1903).

203. 175 U.S. 677, 714.

204. Report of Commissioner E. O. Locke at 55-58, *The Paquete Habana*, 189 U.S. 453.

pealed on two issues: the amount of damages, and whether the government or the naval captors should be liable. Thus, the case returned to the Supreme Court.<sup>205</sup>

The same counsel argued the case; Hoyt by this time had been promoted to Solicitor General. Oral argument was held on March 19, 1903. For the government, as appellant, Hoyt argued that the valuations of the ships were excessive, and that the captors, not the United States, should pay whatever sums were due the owners.<sup>206</sup> Kirlin, for the appellees, argued that the valuations were fair and that the United States should pay them.<sup>207</sup>

The Court's unanimous decision was announced on April 6, 1903.<sup>208</sup> Justice Gray died before the valuation issue reached the Court and his successor, Justice Oliver Wendell Holmes, wrote the second opinion. The Court upheld Kirlin on the question of who should pay the damages, stating that the United States had authorized and adopted the acts of the captors and, therefore, should be liable.<sup>209</sup> The Court reversed the district court on the valuation issue, however, holding that the valuations were not supported by documentary evidence, and remanded the case to the district court for further proceedings.<sup>210</sup>

Although neither the argument nor the decision in the principal case attracted much general public interest,<sup>211</sup> the legal community was quick to comment on the importance of the case. One commentator favorably contrasted the liberal attitude of the Court toward the development of international law with the harsh and formalistic face it had shown in *The Adula*,<sup>212</sup> a case which mechanically applied the continuous voyage principle.<sup>213</sup> Another commentator praised *The Paquete Habana* as "an instructive instance of . . . judicial enlargement of international law."<sup>214</sup> Hoyt himself stated that in *The Paquete Habana* "the harshness of war and the mitigations founded on ethical and human considerations came

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205. Motion to Advance at 1-3, *The Paquete Habana*, 189 U.S. 453.

206. Brief for the United States at 18-40, *The Paquete Habana*, 189 U.S. 453.

207. Brief for the Appellees at 11-64, *The Paquete Habana*, 189 U.S. 453.

208. 189 U.S. 453.

209. *Id.* at 464-65.

210. *Id.* at 466-68. The case did not come to the Supreme Court again, and none of the district court proceedings are reported; accordingly, the final disposition of the valuation issue is not known.

211. The Washington Post, the Washington Evening Star, and the New York Times did not note the argument of the case. The Washington Post reported the decision briefly, without comment. See Washington Post, Jan. 9, 1900, at 2. Neither the Washington Evening Star nor the New York Times reported the decision.

212. 176 U.S. 361 (1900). The Court in *The Adula* upheld the taking in prize of a neutral ship that had previously gone in and out of Havana, with American permission, to take out refugees.

213. Wheeler, *The Law of Prize as Affected by Decisions Upon Captures Made During the Late War Between Spain and the United States*, 1 COLUM. L. REV. 141, 150-52, 155-56 (1901).

214. Baldwin, *The Part Taken by Courts of Justice in the Development of International Law*, 10 YALE L.J. 1 (1900).

into sharp contrast."<sup>215</sup> Perhaps cognizant of the revelations in the second *Paquete Habana* case regarding the vessels' commercial character, Hoyt maintained that the government had attempted to distinguish between larger and smaller coastal vessels, particularly because the smaller ones sometimes subsisted blockaders.<sup>216</sup> This was something of an *ex post facto* defense, because the argument was not one of the government's principal ones. A dissenting English view came from a Justice of the King's Bench who maintained that the exception was a precept of comity only. He stated, in words that would have an ironic ring in the next decade, that "in these days of less rigorous warfare," the "indulgent treatment" of "all kinds of fishing boats" was assured.<sup>217</sup> An American historian, writing some ten years after the decision, criticized the opinion on the basis that "the boats were furnishing food to a beleaguered army," that "their crews were reservists of the Spanish navy," and that "they were intending to violate a blockade" — all dubious propositions.<sup>218</sup> On balance, it appears that the weight of scholarly opinion approved of *The Paquete Habana* decision. Progress in international law and the amelioration of war conditions were subjects of substantial concern at that time, and the Supreme Court's opinion made an important contribution to that movement.

The principles governing naval warfare again became the subject of concern when war erupted between Russia and Japan in 1904. This struggle, the only naval war involving major powers between 1898 and 1914, produced prize litigation that shed light on the scope of the exemption from capture. As the Supreme Court had noted in *The Paquete Habana*, Japan, upon the outbreak of war with China in 1894, had announced that coastal fishing vessels would not be molested.<sup>219</sup> At the beginning of the war with Russia in 1904, after making a similar announcement,<sup>220</sup> Japanese forces captured two Russian deep-sea fishing vessels, the *Michael* and the *Alexander*, and brought them into Sasebo for adjudication. Counsel for the owners evidently argued for development of the exemption along the lines formulated by the Institute of International Law at Turin in 1882, which would have exempted all fishing vessels. Although the Sasebo Prize Court rejected this defense, it recognized the existence of an exemption:

The claimants also argued that the vessel should be re-

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215. Hoyt, *Recent Development and Tendency of the Law of Prize*, 12 YALE L.J. 306, 314 (1903).

216. *Id.*

217. Kennedy, *The Exemption of Private Property at Sea from Capture in Time of War*, 16 YALE L.J. 381, 382-83 (1907).

218. F. CHADWICK, *THE RELATIONS OF THE UNITED STATES AND SPAIN: THE SPANISH-AMERICAN WAR* 146-47 (1911).

219. 175 U.S. 677, 700.

220. Japanese Regulations, 1904, in H. MARTIN & J. BAKER, *LAWS OF MARITIME WARFARE AFFECTING RIGHTS AND DUTIES OF BELLIGERENTS AS EXISTING ON AUGUST 1, 1914* at 516 (1918).

leased in accordance with the intention underlying the exemption from capture of small coastal fishing boats, but the usage . . . arises mainly from the desire not to inflict distress upon poor people who are not connected with the war, and the principle cannot be extended to a vessel like the "*Michael*," which was the property of a company and engaged in deep-sea fishing.<sup>221</sup>

On appeal, the Higher Prize Court affirmed in these words:

It was also argued that a prize court need not be rigidly bound by the rules of international law . . . but that it should adapt its decisions to varying circumstances and create new precedents upon lines which are an advance upon the rules of international law. But existing international law recognizes that an enemy vessel and enemy cargo . . . may be captured, and the hopes expressed that action will be taken in conformity with the resolutions of the Institute of International Law, which have not yet become rules of international law, cannot be considered as grounds for appeal.<sup>222</sup>

The Japanese courts, although recognizing the binding force of the exemption with regard to coastal fishing vessels, acutely differentiated between the consensus of nations — true customary international law — and what in fact was an academic plan for improvement. In doing so, the Japanese court upheld the idea, which characterized Justice Gray's opinion, that international consensus could be determined by history and practice.

The war between Japan and Russia was concluded in 1905. The previous year, President Theodore Roosevelt had requested an opinion from each of the powers regarding the advisability of a Second Peace Conference to continue the work of the First Hague Peace Conference of 1899. The end of the war, and the circumstances under which it was ended, provided a favorable climate in which to begin work on such a project. After a good deal of diplomatic jockeying, plans matured for a Second Hague Peace Conference to meet in June of 1907.

## VI. THE SECOND HAGUE CONFERENCE

The Second Hague Conference is of major importance to the history of international arbitration and the development of rules for land warfare. Its importance to this article, however, is limited to the adoption of rules governing naval warfare, and the effect of *The Paquete Habana* thereon. The instructions from the State Department to American delegates were couched in traditional terms of American naval policy. The delegates were to attempt to obtain a general exemption from capture for

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221. *The Michael*, 2 RUSSIAN AND JAPANESE PRIZE CASES 80, 82 (1904).

222. *Id.* at 84-85.

all noncontraband goods except when a breach of blockade was attempted, to resist efforts to expand the list of articles regarded as contraband, and to attempt to set out in detail the rights and obligations of neutrals, in order to prevent war from spreading and to prevent squabbles between neutrals and belligerents.<sup>223</sup> This was traditional American foreign policy — a disinclination to become involved in European quarrels, and a solicitude for neutral rights.<sup>224</sup> The instructions to the British delegation likewise reflected traditional British maritime policy: rejection, except under conditions of general disarmament, of immunity from capture at sea; substantial restrictions on neutral activities, including the closing of neutral ports to foreign prizes unless in actual distress; and the fewest possible restrictions on the import of food and peaceful raw materials by a belligerent, in view of Britain's status as a food importer.<sup>225</sup>

The work of the Second Peace Conference was delegated to four commissions, each responsible for one subject. The fourth commission dealt with the rules of war at sea, and spent most of its time discussing the issue of immunity of private property from capture. Joseph Hodges Choate, the chief American delegate, had on June 24, 1907, shortly after the Conference opened, presented the American proposal for immunity consistent with his instructions.<sup>226</sup>

The question of the immunity of coastal fishing vessels first arose on August 2, 1907. The delegates agreed that such an exemption existed, and one delegate argued that it should be extended to deep-sea fishers as well.<sup>227</sup> The first detailed discussion of the question occurred on August 7, 1907. Count Tornielli of Italy stated that scientific ships should be exempt, and Baron von Macchio of Austria-Hungary wanted the exemption extended to small boats engaged in local business. Commander Ferraz of Portugal proposed immunity for coastal vessels as long as they did not approach or hinder warships.<sup>228</sup>

Choate took the floor and called the attention of the Commission to *The Paquete Habana*; he quoted Justice Gray's statement that the exemption was an established rule of international law meant to protect only innocent vessels furnishing daily food supplies, and that it did not afford protection to deep-sea fishermen or those participating in hostili-

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223. See generally J. SCOTT, INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL REPORTS 82-84 (1916) (statement of Elihu Root to the United States delegation).

224. See Farewell Address (Sept. 19, 1796) in 35 G. WASHINGTON, THE WRITINGS OF GEORGE WASHINGTON 214, 231-37 (1940).

225. A. HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR 614-25 (1909).

226. 3 J. SCOTT, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS 745 (1921). This is an English translation of the official report published by the Netherlands Ministry of Foreign Affairs. See also J. CHOATE, THE TWO HAGUE CONFERENCES 105-06 (1913).

227. J. SCOTT, *supra* note 226, at 887-88.

228. *Id.* at 900-01.

ties.<sup>229</sup> He noted that the Supreme Court had held the exemption for coastal fishing vessels was a rule of customary international law which prize courts must apply in the absence of treaty or statute. Choate emphasized that the vessels in *The Paquete Habana* fit within the exemption because they were engaged in furnishing the daily supply of fish to feed the city of Havana.<sup>230</sup>

The issue of immunity for coastal fishing vessels was sent to the Committee of Examination for the preparation of a draft convention. None of the members of this committee denied the existence of the exemption; the issue concerned its limits. Committee members wrangled over whether a certain distance from the coast should be specified for "coastal" vessels, whether powered boats should be included within the ambit of the exception, whether the convention should contain provisions for indemnity, and similar matters.<sup>231</sup> Eventually a report to the fourth commission was produced by the French delegate, Henri Fromageot, who was strongly influenced by *The Paquete Habana* approach. The report cited *The Paquete Habana* and stated that the exemption was an ancient custom, which now had received universal approval. The exemption served a humanitarian purpose: "[T]o avoid doing poor people, who are especially deserving of interest, an injury which would be of no benefit to the belligerent."<sup>232</sup> Moreover, it was unwise to set limits on tonnage, crew size, or distance from shore in deciding whether the exemption applied, because these were matters that should be taken into account on a case-by-case basis in deciding whether a particular ship and crew were harmless, peaceful, and deserving of protection.<sup>233</sup>

The draft convention chapter, unanimously approved by the fourth commission, combined Belgian and Portuguese proposals on fishing boats, an Austro-Hungarian proposal on small trading vessels, and an Italian proposal on scientific/philanthropic vessels.<sup>234</sup> It became Chapter II of Hague Convention XI, which, after an allowance is made for the treatment of vessels other than fishing smacks, is distinctly reminiscent in tone and content of language contained in *The Paquete Habana*:

## Chapter II.

### Exemption from Capture of Certain Vessels.

#### Article 3.

Vessels employed exclusively in coast fisheries, or small

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229. *Id.* at 902-03; *see also* *The Paquete Habana*, 175 U.S. 677, 708 (1900).

230. J. SCOTT, *supra* note 226, at 902-03.

231. *Id.* at 957-62, 968-73, 1006.

232. *Id.* at 1009.

233. *Id.* at 1010-12.

234. C. DAVIS, *THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE* 231-32 (1975); A. HIGGINS, *supra* note 225, at 403-05; *see supra* note 228 and accompanying text.



boats employed in local trade, are exempt from capture, together with their appliances, rigging, tackle, and cargo.

This exemption ceases as soon as they take any part whatsoever in hostilities.

The Contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance.

#### Article 4.

Vessels charged with religious, scientific, or philanthropic missions are likewise exempt from capture.<sup>235</sup>

The prescience of Justice Gray's estimation regarding the development of international law on the subject of exemption from capture was apparent from the reaction of the nations when the convention was opened for signature. All but four of the nations represented at the conference signed the convention. Moreover, none of the signatories attached any reservations thereto.<sup>236</sup>

Although it is difficult to assess accurately the effect of *The Paquete Habana* on the adoption of Hague Convention XI, its influence appears to have been substantial. There was agreement from the outset that some form of immunity existed, but disagreement as to the form it should take. Choate's citation of *The Paquete Habana* to the commission, its influence on Fromageot's report, and the wording of the convention article itself, all show the influence of Justice Gray's historical analysis and conclusions. Matters had come full circle in less than a single decade. Justice Gray had canvassed an enormous range of sources to establish the existence of the exemption as a rule of customary international law. The Hague Convention used Justice Gray's opinion to transmute that customary consensus into a multilateral rule of positive international law.

### VII. WORLD WAR I

Following the Hague Conference of 1907, immunity of coastal fishing vessels generally was accepted as a rule of international law. Germany in 1909, France in 1912, and Austria-Hungary in 1913 revised their prize rules to follow the provisions of Hague Convention XI.<sup>237</sup> Treatise writers of various nations, including Great Britain, treated it as an established rule of international law.<sup>238</sup> The United States, which had

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235. A. HIGGINS, *supra* note 225, at 396-97.

236. *Id.* at 406, 537; see 1 J. SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907 at 134-37 (1909) (Fourth Commission's work considered a failure).

237. H. MARTIN & J. BAKER, *supra* note 220, at 516-17.

238. H. BONFILS, MANUEL DE DROIT INTERNATIONAL PUBLIC 873-75 (1912); C. DUPUIS, LE DROIT DE LA GUERRE MARITIME D'APRES LES CONFERENCES DE LA HAYE ET DE LONDRES 206-11 (1911); J. HALL, THE LAW OF NAVAL WARFARE 94-95 (1921); 2 J. WESTLAKE, INTERNATIONAL LAW 155-60 (1913).

included the coastal fishery exception in its Naval Code of 1900, issued new draft instructions in 1913 which comported with Hague Convention XI.<sup>239</sup>

Much of this certainty, however, evaporated with the outbreak of war in Europe in August of 1914. The primary naval belligerents, Great Britain and Germany, plunged into blockade confrontation with each other over a period of several months. In November of 1914, Britain declared the entire North Sea a war zone, ostensibly in response to German minelaying. Britain's proclamation specifically subjected fishermen to capture, thus raising questions as to their immunity under chapter II, article three, of Hague Convention XI. The practical effect of the British proclamation, however, given the territory involved, was primarily on deep-sea fishers. In a retaliatory declaration, Germany declared the waters around Britain a war zone, and stated that all enemy merchant vessels within the zone would be destroyed. In response to the German declaration, British Orders in Council of March 11, 1915, imposed a *de facto* blockade on Germany (earlier, France and Britain had imposed a formal blockade on the German colonies in East Africa).<sup>240</sup>

The international law problems with such blockading and counter-blockading arose because neither Britain nor Germany followed the classical "close-in" form used by the United States in 1898, where ships steamed a short distance outside a port to intercept blockade runners. By 1914, technology had advanced to the point that a close-in blockade of a well-armed adversary was virtually impossible.<sup>241</sup> This was due primarily to one improved weapon — the mine — and one new weapon — the submarine. Britain, which opposed mining as she opposed anything that limited the effectiveness of her surface fleet, regarded the act of mining as dishonorable. German mining was the pretext for the first British war zone action.<sup>242</sup> Germany's chief dilemma, however, concerned the submarine, which by its nature could not take prizes into port for adjudication.<sup>243</sup> Moreover, the British began arming merchant ships, which meant that German submarines could no longer surface, warn the prize that it would be destroyed, and allow the crew to leave, without running an unacceptable risk of destruction. The only alternatives open to Germany were abandonment of submarine warfare, thereby relinquishing its

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239. H. MARTIN & J. BAKER, *supra* note 220, at 516; G. WILSON, DRAFT NO. 2 FOR PROVISIONAL INSTRUCTIONS FOR THE NAVY DEFINING THE RIGHTS OF BELLIGERENTS AND NEUTRALS, LAWS OF BLOCKADE AND CONTRABAND OF WAR 20 (1913).

240. Garner, *Some Questions of International Law in the European War*, 9 AM. J. INT'L L. 594, 594-96 (1915).

241. Holtzoff, *Some Phases of the Law of Blockade*, 10 AM. J. INT'L L. 53, 57 (1916).

242. See A. HIGGINS, *supra* note 225, at 618, for a discussion of British opposition to the use of mines.

243. Huberich & King, *The Development of German Prize Law*, 18 COLUM. L. REV. 503, 517-18 (1918); see *The Tello* (Superior Court of Prize, June 28, 1916) (German submarine unsuccessfully attempted to take a Swedish ship into a German port for adjudication).

only weapon against the British long-distance blockade, or engagement in unlimited submarine warfare, which meant that German submarines would attack British shipping without first providing a warning.

For two years Germany struggled to use the submarine weapon effectively without bringing the United States into the war. The German effort ended in failure and is beyond the scope of this article. It should be pointed out, however, that the German attitude that international law must take cognizance of technological developments which may require modifications in the rules of naval warfare, or jettisoning of outmoded rules, seems to be more in line with Justice Gray's idea of international law as a dynamic, developing entity than the British attitude that the submarine — which had never been condemned either by treaty or international custom — was per se unlawful.<sup>244</sup> Recent scholarship has upheld, in a convincing manner, the legality under international law of the German "operational area" submarine actions in both World Wars.<sup>245</sup>

Although long-distance blockading made contact between coastal fishing vessels and blockaders unlikely, cases involving the exception arose during the war in both British and French courts. The leading case was *The Berlin*,<sup>246</sup> involving a seventy-nine ton German fishing boat captured 110 miles off Scotland on August 5, 1914.<sup>247</sup> In arguing for condemnation, counsel for the Crown maintained that if the vessel were fishing it could not be coastal, and that if it were not coastal it was taking part in hostilities. The Crown further maintained that, because the *Berlin* was salting the fish, not taking them in alive, it was not a coastal fishing boat.<sup>248</sup>

The judge, Sir Samuel Evans, began his opinion by paying tribute to *The Paquete Habana*:

The history of the varying practices in this and other countries of exempting from capture in war vessels engaged in coast fishing, up to the year 1899 has been given in the Supreme Court of the United States of America in the case of the *Paquete Habana* and the *Lola*. The judgment of the court was delivered by Mr. Justice Gray. It is full of research, learning, and historical interest. As such an elaborate and complete resume is available in that judgment, it would be a work of super-

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244. *Id.* at 508-09 (German view was that prize law was national law, which was to be applied even if in conflict with principles of international law). For a British view, see James, *Modern Developments of the Law of Prize*, 75 U. PA. L. REV. 505, 510-11 (1927) (principles of international law allow the sinking of enemy vessels solely for reasons of urgent military necessity).

245. W. MALLISON, *STUDIES IN THE LAW OF NAVAL WARFARE: SUBMARINES IN GENERAL AND LIMITED WARFARE* 52-86 (1968).

246. 2 Lloyd 43 (1914); see J. GARNER, *PRIZE LAW DURING THE WORLD WAR: A STUDY OF THE JURISPRUDENCE OF THE PRIZE COURTS 1914-1924*, at 240-43 (1927).

247. J. HALL, *supra* note 238, at 95.

248. 2 Lloyd 43, 43-59 (1914).

erogation for me to attempt to perform a similar task.<sup>249</sup>

After reviewing the Russo-Japanese War cases of *The Michael* and *The Alexander*,<sup>250</sup> Evans, without deciding the question of the applicability of Hague Convention XI, held that the exemption "has become a sufficiently settled doctrine and practice of the law of nations."<sup>251</sup> The Berlin, however, did not come within the purview of the exemption because "by reason of her size, equipment, and voyage, she was a deep-sea fishing vessel engaged in a commercial enterprise which formed part of the trade of the enemy country, and as such was properly captured as prize of war."<sup>252</sup> In a later case, *The Stoer*,<sup>253</sup> involving a trawler which had been captured off the Shetland Islands and sunk because of the lack of a prize crew, Evans reiterated his view that deep-sea trawlers were not entitled to any immunity from capture.<sup>254</sup>

A French case, *The Marbrouck*,<sup>255</sup> arose out of the war in the Middle East. In this case there does not seem to be any doubt as to the vessels' coastal nature; they were small schooners carrying the Turkish flag. The question was whether the vessels were "taking part in hostilities" and thereby had forfeited the exemption. The French prize court held that the boats had participated in hostilities by providing food to blockaded ports in Syria and Asia Minor and therefore were good prize.<sup>256</sup> This finding is somewhat troubling, however, unless the boats were operating under military orders; if boats become participants in warfare merely by taking in a cargo of fish, the exemption is rendered virtually useless.

On balance, the belligerents appear to have consistently adhered to the exemption during World War I.<sup>257</sup> The long-distance blockade made contact with coastal fishing vessels uncommon, and the few cases that did arise generally involved deep-sea vessels.<sup>258</sup> Nonetheless, the utility

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249. *Id.* at 63-64.

250. *See supra* notes 221-22.

251. 2 Lloyd 43, 66 (1914). The question of the applicability of Hague Convention XI to the facts of this case remains unanswered. Article 9 of the Convention provided that it was not to apply to a war unless all of the belligerents were parties to it. A. HIGGINS, *supra* note 225, at 401. Montenegro, a belligerent, had not signed it.

252. *Id.* at 67-69.

253. 5 Lloyd 18 (1916).

254. *Id.* at 19.

255. [1918] JOURNAL OFFICIEL 5506 (June 25, 1918).

256. C. COLOMBOS, A TREATISE ON THE LAW OF PRIZE 147 (1940).

257. Professor Lassa Oppenheim claimed that Germany sank British boats during World War I, but did not elaborate. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 266 (1921). If this were true, it is likely that the British boats were larger deep-sea vessels, because a submarine, even if it could get into coastal waters, would hardly waste one of its limited supply of torpedoes or call attention to itself by surfacing to destroy a small coastal smack.

258. The only American case was *The S.S. Appam*, 243 U.S. 124 (1917), which involved an attempt by a German prize crew to take a British prize into Hampton Roads and keep her there indefinitely. The Supreme Court affirmed a decree that had restored

of the rule as a matter of international law was evident to the belligerents, and it survived the great struggle.

Although the interwar years of 1918-39 saw a great deal of attention paid to the reduction of naval armaments, little attention was paid to the law of prize. One relevant international agreement was article twenty-two of the London Naval Treaty of 1930 governing submarine warfare.<sup>259</sup> The treaty provided for tacit recognition of the legality of submarine warfare; however, with regard to recognition of the submarine as a weapon which had revolutionized naval warfare, the language of the treaty was ambivalent. The treaty contained provisions that required a submarine, before sinking a merchantman, to surface and allow the crew and passengers to go to a place of safety; the merchantman's life boats constituted "a place of safety" only if proximity to land or shipping made them so. If this provision were read literally, it would have imposed impossible conditions, conditions that were ignored by all belligerents who conducted submarine warfare in World War II.

If read in the context of the traditional immunities afforded vessels not participating in hostilities (immunities which included *The Paquete Habana* principle), however, the treaty was a reasonable approach to submarine warfare and was generally adhered to by the belligerents in World War II. The requirement that a submarine surface prior to attack made tactical sense only if the merchantmen were unarmed and not participating in hostilities; otherwise, the risk was unacceptable. Armed merchantmen, being participants in warfare, forfeited immunity and were subject to attack without warning. Unarmed merchantmen, which actively participated in hostilities by such acts as travelling in convoys or serving as troop transports, likewise were subject to attack. In a general war such as World War II, essentially all belligerent merchantmen might be deemed to be actively participating in hostilities; therefore, it was reasonable to treat all enemy merchantmen, except perhaps isolated vessels outside operational zones or far from usual shipping lanes, as subject to attack without warning.<sup>260</sup> Even neutral merchantmen integrated into the enemy war effort could be so attacked.<sup>261</sup> This policy took into account both the humanitarian values which underlay the traditional immunity of noncombatant vessels and belligerents' interest in the use of the submarine as an effective anticommerce weapon.

## VIII. WORLD WAR II

The history of World War II with respect to blockade is similar to

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the ship and cargo to their owners, on the basis that an American treaty with Germany did not permit the indefinite layup of German prizes in American ports.

259. International Treaty for the Limitation and Reduction of Naval Armament, Apr. 22, 1930, art. XXII, 46 Stat. 2858, 2881-2882, T.S. No. 830, at 27, 112 U.N.T.S. 65, 88.

260. W. MALLISON, *supra* note 245, at 119-20.

261. *Id.* at 129-30.

that of World War I, except that the struggle was fought on a broader scale. The development of aircraft as means of antiship and antisubmarine warfare, together with improvements in submarines and mines, made the long-range aspect of the blockade even more acute. Germany carried on unrestricted submarine warfare in the Atlantic, as did the United States in the Pacific after 1941. The long-range aspect made contact between hostile warships and coastal fishing vessels highly unlikely, and, as a result, there were fewer prize cases than there had been during World War I. Because Germany's surface fleet was "bottled up" for most of the war and emerged only for hit-and-run raiding, prize taking and adjudication by Germany was essentially nonexistent. Only Britain had any sizable number of prize cases, and these dealt mostly with contraband and reprisal.<sup>262</sup> There were no cases involving fishing boats.<sup>263</sup>

The United States had in 1941, as in 1917, directed its navy to exempt coastal fishing vessels from capture.<sup>264</sup> Very few prize cases came into American courts until the end of the war, when several German vessels docked in cities captured by American ground forces were libeled in prize. By the end of 1945, eleven prize libels were pending in the United States District Court for the Southern District of New York.<sup>265</sup>

World War II contributed little to prize law, except for refinement of the law of contraband and of procedure.<sup>266</sup> *The Paquete Habana* principle, although not formally challenged, may have seemed archaic after the war because the long-distance blockades used in World War II did not concern themselves with coastal fishing vessels. The direction of warfare since 1945, however, has taken a different turn, and *The Paquete Habana* has kept its place in the law of naval warfare.

## IX. *THE PAQUETE HABANA* PRINCIPLE IN LIMITED WARS AFTER 1945

After 1945, warfare took a turn which was not necessarily foresee-

262. Rowson, *British Prize Law, 1939-1944*, 61 L.Q. REV. 49 (1945); Rowson, *British Prize Law, 1944-1946*, 63 L.Q. REV. 337 (1947). At the outbreak of war, Britain and the continental countries had issued new prize rules, evidently expecting more cases than in fact occurred. After the United States entered the war, Philip C. Jessup criticized the Southern District of New York for issuing prize rules that were essentially glosses on those of 1861. Jessup, *Prize Rules*, 36 AM. J. INT'L L. 452, 452-54 (1942). See also Sereni, *Italian Prize Courts, 1866-1942*, 37 AM. J. INT'L L. 248 (1943).

263. A British author writing in 1940 stated that Germany had "bombed, machine-gunned or sunk" over 200 fishing vessels in the first year of the war. See C. COLOMBOS, *supra* note 256, at 252. There is no way of knowing how many, if any, of these were exempt coastal vessels.

264. UNITED STATES NAVY, TENTATIVE INSTRUCTIONS FOR GOVERNING MARITIME AND AERIAL WARFARE 7 (1941).

265. Knauth, *supra* note 91. Most of these were unreported. For reported American prize cases, see *The Europa*, 80 F. Supp. 12 (S.D.N.Y. 1948) and *Ling v. 1689 Tons of Coal Lying Aboard S.S. Wilhelmina*, 78 F. Supp. 57 (W.D. Wash. 1942).

266. Knauth, *supra* note 91, at 69.

able. General declared wars were replaced by limited wars,<sup>267</sup> fought for limited objectives. Because many of these wars were fought in less developed parts of the world where coastal fisheries of the traditional type operated, attempts at naval interdiction or blockade in such situations involved *The Paquete Habana* principle. Two of the most notable limited wars, Korea and Vietnam, involved the United States in situations of naval blockade or interdiction.

The Korean War involved a theater of operations that was conducive to establishment of a classical naval blockade. Both North and South Korea, which occupy a peninsula that extends southward from China, were accessible to naval action. Moreover, North Korea had a small navy and little airpower that it could use to harass blockade ships. Thus, a close naval blockade of North Korea was a feasible strategy. The blockade was formally proclaimed in July, 1950, by President Truman.<sup>268</sup>

During the Korean War, the United States openly flouted *The Paquete Habana* principle by seizing and summarily destroying all coastal fishing vessels that its forces could capture. This policy began in September 1950, with a leaflet campaign which informed North Korean fishermen that their boats would be destroyed or confiscated and their crews beached if they fished prior to the expulsion of the Communists. The rationale behind this policy was that fish were such an important part of the Korean diet that foodstuffs could be regarded as contraband. Moreover, there had been numerous instances of fishing boats engaging in minelaying or military communications. It was thought that the interdiction of fishing vessels would vastly increase North Korea's supply problems.<sup>269</sup>

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267. For a discussion of the pre-1967 Arab-Israeli limited war situation, see Brown, *World War Prize Law Applied in a Limited War Situation: Egyptian Restrictions on Neutral Shipping with Israel*, 50 MINN. L. REV. 849, 856-73 (1966). The mining of the Red Sea, which damaged at least 19 commercial vessels in July and August of 1984, is difficult to assess in light of *The Paquete Habana* principle. Despite intense efforts by several nations, only one mine was recovered, and no one has claimed responsibility for laying the mines. Nonetheless, from the minuscule amount of evidence available, it does not appear that the immunity of coastal fishermen was seriously threatened. Evidently, none of the damaged vessels were engaged in coastal fishing, although one Soviet commercial, refrigerated fish carrier was damaged. The mine recovered was a Soviet device, some 10 feet long and activated by a timer. It was found at a depth of over 125 feet, which does not suggest an intention to harm coastal fishing vessels. It appears more likely that the mine was planted to interdict commercial shipping bound for the Suez Canal, an objective which does not violate *The Paquete Habana* principle. N.Y. Times, Aug. 18, 1984, at A3, col. 1; *id.*, Aug. 15, 1984, at 1, col. 2; *id.*, Aug. 14, 1984, at 1, col. 6; *id.*, Aug. 12, 1984, at 12, col. 1; *id.*, Aug. 9, 1984, at A5, col. 1; *id.*, Aug. 8, 1984, at A8, col. 1; *id.*, Aug. 6, 1984, at 1, col. 2; Washington Post, Oct. 12, 1984, at A31, col. 1; *id.*, Oct. 4, 1984, at A23, col. 5; *id.*, Oct. 1, 1984, at A18, col. 1; *id.*, Sept. 25, 1984, at A18, col. 2.

268. M. CAGLE & F. MANSON, *THE SEA WAR IN KOREA* 281 (1957).

269. *Id.* at 296-97; Clark, *Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device*, 27 JAG J. 160, 174 (1973); W. MALLISON, *supra* note 245, at 127.

The overwhelmingly superior American naval forces easily eliminated North Korean deep-sea fishing. North Korean coastal fishing, however, was much more difficult to eliminate, because the fishermen subsisted on their catch and continued to challenge the blockade in order to eat. Moreover, their simple wooden boats could be replaced easily if they were destroyed, and the heavy-draft American ships often were unable to come near the coast.<sup>270</sup>

The effectiveness of the blockade as a military measure is somewhat difficult to assess; however, conditions that resulted from imposition of the blockade appear to provide support for the humanitarian values implicit in *The Paquete Habana* opinion and undermine the blockade strategy on practical grounds. The blockade was damaging to the North Koreans insofar as it caused substantial suffering among the fishermen and other civilians. A large number of North Korean civilians were forced to cross over the American lines looking for food.<sup>271</sup> There is no indication, however, that the combat effectiveness of North Korean or Chinese troops was seriously affected. On balance, the decision by the United States openly to disregard *The Paquete Habana* principle during the Korean war reasserted the relevance of both the humanity rationale and the pragmatism underlying *The Paquete Habana* opinion. Fishing vessels that actually engaged in hostilities rightfully were taken; however, the imposition of a general interdiction on coastal fishing was neither good law nor good policy. The American action occupied a large number of naval personnel who could have been used more effectively elsewhere. Moreover, the destruction of coastal fishing vessels caused substantial civilian suffering; yet, because the North Koreans fed their soldiers first, destruction of the vessels did not have the desired military effect upon the enemy.

The other significant limited war in which the United States was involved was the protracted conflict in Vietnam.<sup>272</sup> During the Vietnam conflict, the United States kept its naval operations on a lower key than it had in Korea; accordingly, there was no formal declaration of blockade. The magnitude of United States naval forces in Southeast Asia, however, was greater than that involved in Korea. Three different operations in the Vietnam naval theater are relevant to this article: Operation Market Time, Operation Sea Dragon, and the mining of the North Vietnamese coast.

Operation Market Time was a joint operation conducted by the

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270. M. CAGLE & F. MANSON, *supra* note 268, at 297.

271. *Id.* at 353-57.

272. The naval "quarantine" of Cuba in 1962 was deployed to prevent warships and merchantmen from reaching the island, and was conducted on a long-range basis, so that the fishing vessel question did not arise. See generally Christol & Davis, *Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba*, 1962, 57 AM. J. INT'L L. 525 (1963); Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Self-Defense Claims Valid Under International Law*, 31 GEO. WASH. L. REV. 335 (1962).



United States and South Vietnam off the South Vietnamese coast. The purpose of the operation was to control infiltration of men and material by sea. The operation was based not on blockade, because blockade was viewed as an act of war, but on South Vietnam's inherent right to control passage through its territorial waters. Under the 1958 Geneva Convention on the Law of the Sea,<sup>273</sup> South Vietnam, for security reasons, could suspend the right of innocent passage up to twelve miles offshore.<sup>274</sup> American and South Vietnamese warships plied the coasts of South Vietnam, stopping and searching suspicious vessels. The scope of the operations was enormous; between 1965 and 1967, the American forces discovered 73,000 vessels, inspected 15,000 vessels, and boarded 6,000 vessels; the South Vietnamese inspected 204,000 vessels.<sup>275</sup> Although coastal fishing vessels were not exempt from inspection, Operation Market Time conformed to the essence of *The Paquete Habana* principle because such vessels were not molested unless they carried contraband or engaged in the hostilities.<sup>276</sup>

Operation Sea Dragon more closely resembled a classical blockade because it involved action off the enemy coast. Essentially, Operation Sea Dragon consisted of operations within twelve miles of the North Vietnamese coast aimed at interdicting North Vietnamese logistical support for its forces in the south. It included surveillance of vessels, destruction of water-borne logistic craft, and naval gunfire aimed at shore points. Particularly notable was the length to which the American forces in this "quasi-close blockade" situation went to comply with *The Paquete Habana* principle and the requirements of Hague Convention XI. Because it was difficult to distinguish boats engaged in fishing from those taking part in hostilities, a detailed study was made of fishing practices in the Gulf of Tonkin. From this study, a profile was created which purported to characterize legitimate fishermen. Detailed operational orders were drafted on the basis of this profile; the objective was to perform the military mission without molesting peaceful fishermen.<sup>277</sup> This was an innovative and praiseworthy attempt to obey the dictates of international law in a complex limited war situation.

The mining of the North Vietnamese coasts, and later Haiphong harbor, in 1972 and 1973 was essentially a "blockade" achieved through the use of mines; its objective was to interdict traffic to North Vietnam while minimizing the potential for a naval confrontation. Here, as in Operation Sea Dragon, the United States used ingenious methods to achieve military objectives while attempting to afford coastal fishing ves-

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273. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. XVI, 15 U.S.T. 1606, 1611, 516 U.N.T.S. 205, 216.

274. Carlisle, *The Interrelationship of International Law and United States Naval Operations in Southeast Asia*, 22 JAG J. 8, 11-13 (1967); O'Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y.B. INT'L L. 19, 24-25 (1970).

275. Carlisle, *supra* note 274, at 13.

276. *Id.*

277. O'Connell, *supra* note 274, at 33-35.

sels their traditional immunity. Magnetic mines were used which would explode if touched by the metal hull of a merchantman, but not if touched by the wooden hull of a fishing boat. Contemporaneously, the United States announced it would use other forms of mines if the fishing boats were used for military purposes.<sup>278</sup> The mining achieved its objective. It forced North Vietnam to the bargaining table; however, it did so without compromising the humanitarian values inherent in *The Paquete Habana* exemption.

In Vietnam, the United States fought a war of naval interdiction with a scrupulous regard for international law and, indeed, a willingness to use innovative methods to comply with its responsibilities in new and difficult situations. This effort evidences the continuing validity of *The Paquete Habana* principle.

A recent development involving the United States, although not to the extent of the limited wars in Korea and Vietnam, also brings to mind *The Paquete Habana* principle. In April, 1984, it was revealed that Latin American employees of the Central Intelligence Agency, operating from CIA-controlled ships, had laid mines in and near the Nicaraguan harbors of Corinto and Puerto Sandino, on the Pacific coast, and El Bluff, on the Caribbean coast.<sup>279</sup> The mines were rather crude handmade acoustic devices, evidently designed to explode noisily, cause minimal damage, and thus frighten away ships instead of sinking them.<sup>280</sup> Some eight ships, however, were sunk or damaged by the mines.<sup>281</sup> The majority of these were non-Nicaraguan freighters and tankers; however, two Nicaraguan fishing boats were sunk, with two fatalities and a number of injuries. A number of crewmen on the non-Nicaraguan ships were also injured.<sup>282</sup> The episode caused a furor in Congress,<sup>283</sup> and eventually resulted in the passage of a nonbinding "sense of the Congress" resolution opposing the use of any appropriated funds for the mining of Nicaraguan ports or waters.<sup>284</sup>

Although the facts surrounding the laying of mines in Nicaraguan waters are by no means completely clear, the destruction of Nicaraguan coastal fishing vessels makes *The Paquete Habana* principle relevant. It

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278. Clark, *supra* note 269, at 175-78; Swayze, *Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam*, 29 JAG J. 143, 159 (1977).

279. Wall Street Journal, Apr. 6, 1984, at 6, col. 1; Washington Post, Apr. 7, 1984, at A1, col. 1.

280. Washington Post, Apr. 7, 1984, at A1, col. 1; 130 Cong. Rec. H2897 (daily ed. Apr. 12, 1984) (statement of Rep. Siljander).

281. Washington Post, Apr. 7, 1984, at A1, col. 1; 130 Cong. Rec. S4140-41 (daily ed. Apr. 9, 1984) (statement of Sen. Kennedy); Cong. Rec. H2885 (daily ed. Apr. 12, 1984) (statement of Rep. Weiss).

282. Washington Post, Apr. 7, 1984, at A1, col. 1.

283. Washington Post, Apr. 11, 1984, at A1, col. 5; *id.*, Apr. 10, 1984, at A1, col. 3; Wall Street Journal, Apr. 10, 1984, at 2, col. 2.

284. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2907, 98 Stat. 494, 1210 (1984).

appears that the mines were laid indiscriminately, both in and around the harbors, in order to deter commerce and navigation.<sup>285</sup> At least one of the ports, El Bluff, is relatively small and obscure, precisely the sort of harbor from which coastal fishermen frequently operate.<sup>286</sup> Although it is not certain the two fishing boats sunk were the sort of coastal vessels that *The Paquete Habana* principle protects, the indiscriminate mine laying in harbors and waters used by protected coastal fishermen demonstrates an insensitivity to the immunity afforded fishing vessels under international law. The United States clearly failed to operate in Nicaragua with the sensitivity to international law that it demonstrated during the Vietnam conflict.

#### X. THE LARGER HERITAGE OF *THE PAQUETE HABANA*

Before concluding a study of the influence of *The Paquete Habana*, it is necessary to examine its general influence on American law, outside the law of naval warfare. Justice Gray's statement that "international law is part of our law,"<sup>287</sup> and his view of international law as a growing and changing consensus of nations, have borne fruit recently in some remarkable opinions from the federal courts.

The basic principle that United States courts must determine and apply international law has been recognized in many contexts, including the Trading With The Enemy Act,<sup>288</sup> the interdiction of narcotics,<sup>289</sup> and even litigation concerning the conditions in United States prisons.<sup>290</sup> Recently, *The Paquete Habana* has been applied in two cases that illustrate the enduring quality of Justice Gray's concern for an effective and developing corpus of international law.

*Fernandez v. Wilkinson*<sup>291</sup> was a habeas corpus proceeding involving a Cuban "boat person" who had been jailed without a hearing for violating United States immigration laws. The McCarran-Walter Act<sup>292</sup> (the immigration statute) provided an excludable alien with no remedy for arbitrary detention. The district court held, however, that international law did provide such a remedy, and cited *The Paquete Habana* and *Filartiga v. Pena-Irala*<sup>293</sup> as authority for the development of international law, its sources, and its place in American law. Finding that freedom

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285. Washington Post, Apr. 7, 1984, at A1, col. 1; 130 Cong. Rec. H2885 (daily ed. Apr. 12, 1984) (statement of Rep. Weiss).

286. 130 Cong. Rec. S4140-41 (daily ed. Apr. 9, 1984) (statement of Sen. Kennedy).

287. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

288. *Tag v. Rogers*, 267 F.2d 664, 666 (D.C. Cir. 1959).

289. *United States v. Conroy*, 589 F.2d 1258, 1207 (5th Cir.), cert. denied, 444 U.S. 831 (1979).

290. *Lareau v. Manson*, 507 F. Supp. 1177, 1192 (D. Conn. 1980), modified, 651 F.2d 96 (2d Cir. 1981).

291. 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom. Rodriguez-Fernandez v. Wilk*, 654 F.2d 1382 (10th Cir. 1981).

292. Act of June 27, 1952, ch. 477, 66 Stat. 163 (codified at 8 U.S.C. § 1101ff).

293. 630 F.2d 876 (2d Cir. 1980).

from arbitrary detention was a right secured by the Universal Declaration of Human Rights,<sup>294</sup> the court cited the United Nations Charter<sup>295</sup> and a concurring opinion in the International Court of Justice in the *South-West Africa Cases*<sup>296</sup> to the effect that international consensus and custom can bind nonsignatories to the terms of an international agreement.<sup>297</sup> The court emphasized the growth and development of a customary international law of human rights and ordered the petitioner's release within a set time.<sup>298</sup>

Even more striking is *Filartiga v. Pena-Irala*,<sup>299</sup> a case which closely parallels *The Paquete Habana*. The plaintiffs were Paraguayan citizens who had applied for asylum in the United States. They brought a civil action against the defendant, a Paraguayan visiting the United States, under the Alien Tort Statute<sup>300</sup> for the wrongful death of their son by torture in Paraguay. The issue was whether the district court had jurisdiction over such an action. The court of appeals cited *The Paquete Habana* for the proposition that a rule of comity could ripen into settled international law, stating that courts must interpret international law "as it has evolved and exists among the nations of the world today."<sup>301</sup> The court, in the manner of Justice Gray, proceeded to survey the international law on the subject of torture, to discern whether there was a consensus as to the law and, if so, to determine what the consensus was. It examined the United Nations Charter,<sup>302</sup> the Universal Declaration of Human Rights,<sup>303</sup> General Assembly Resolution 2625 of 1970 on international law,<sup>304</sup> and General Assembly Resolution 3452 of 1975 on the protection of persons from being subjected to torture.<sup>305</sup> Noting that the General Assembly had adopted these resolutions by consensus and without dissent,<sup>306</sup> the court conducted further examination of the works of jurists and publicists on the subject.<sup>307</sup> Following its examination, the court concluded that torture was a violation of customary international law, and that the Alien Tort Statute granted the district court jurisdiction to adjudicate rights secured by international law.<sup>308</sup> The court

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294. 3 U.N. GAOR C.3 Annexes (Agenda Item 58) at 535, U.N. Doc. A/777 (1948).

295. U.N. CHARTER.

296. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 76 (Ammoun, V.P., concurring).

297. *Id.*

298. 505 F. Supp. 787, 796-800 (D. Kan. 1980).

299. 630 F.2d 876 (2d Cir. 1980).

300. 28 U.S.C. § 1350 (1982).

301. 630 F.2d 876, 881 (2d Cir. 1980).

302. See *supra* note 295 and accompanying text.

303. See *supra* note 294 and accompanying text.

304. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

305. G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

306. 630 F.2d 876, 893 (2d Cir. 1980).

307. *Id.* at 883-84.

308. *Id.* at 881-89.

closed with an eloquent statement which echoed Justice Gray's findings on the international consensus on naval warfare:

In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental rights is in their national and collective self-interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become — like the pirate and the slave trader before him — *hostis humani generis*, an enemy to all mankind. Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.<sup>309</sup>

Certainly these opinions, based not only on *The Paquete Habana* itself, but also on Justice Gray's methodology and his conception of an evolving body of international law, are fitting tributes to the continued importance of the ideals of *The Paquete Habana* to American jurisprudence.

## XI. CONCLUSION

*The Paquete Habana* did not emerge *ex nihilo*. The decision, like the sources it canvassed, was the product of an extended development of international law. A century of American prize and admiralty law and a tradition of international law dating back to Justice Marshall contributed to Justice Gray's opinion. Nonetheless, this should not denigrate Justice Gray's contribution. His prodigious historical research, his sense of order, and his conception of a living and growing international law based on the consensus of nations made *The Paquete Habana* an important precedent in international law.

The opinion exerted a strong influence on the law of naval warfare. It established a principle of immunity, later incorporated into an international convention, which has survived two world wars and numerous smaller ones. Recent experience in Vietnam demonstrates that the United States will go to extraordinary lengths to comply with *The Paquete Habana* principle. Perhaps more important than the principle itself is the illustration it provides of the survival and progression of international law through great upheavals and difficult times.

*The Paquete Habana*, however, is more than merely a decision about naval warfare. Its declaration that "international law is part of our law" is both a hope and a promise — a hope for the continued development of a system of world order based on international consensus and a promise of American participation in the development of that system. As is apparent from *Filartiga v. Pena-Irala*<sup>310</sup> and *Fernandez v. Wilkinson*,<sup>311</sup> the

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309. *Id.* at 890.

310. 630 F.2d 876 (2d Cir. 1980).

311. 505 F. Supp. 787 (D. Kan. 1980).

development of international law continues to *inform* our judiciary. The thread running through the lengthy historical analysis is the survival and development of international law. Justice Gray might well be pleasantly surprised at the innovations the United States used in Vietnam to comply with international law and the use of *The Paquete Habana* in such areas as immigration law. But in one respect, Justice Gray would not be surprised. The vitality of customary international law continues. Although the form of international law may vary with the times and the needs of nations, it will endure. This is the true import of *The Paquete Habana*.